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## The Federal Coal Follies - A New Program Ends (Begins) A Decade of Anxiety

John Leonard Watson

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# THE FEDERAL COAL FOLLIES—A NEW PROGRAM ENDS (BEGINS) A DECADE OF ANXIETY??

BY JOHN LEONARD WATSON\*

*Problems are nothing more than opportunities for solutions!*

—Robert Snyder\*\*

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\*\* Friend, accomplice, eternal optimist.

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## I. INTRODUCTION

### A. *Preface*

This article focuses on the history, outline, and implementation of the new Federal Coal Management Program (FCMP) which has preoccupied the Department of Interior during the administrations of at least three presidents. This introduction will briefly review the coal resource in the United States in general and the federal coal resource in particular. Part II outlines the history of the federal coal leasing program over the decade of the 1970's. This is followed in Part III by a detailed discussion of the new FCMP which has been developed over the last two years and is now in the initial stages of implementation. Part III will focus on the principal differences between the old and new coal programs. Part IV provides a critical review of the new program and discusses recommendations for revisions. Part V presents brief conclusions on the future of federal coal leasing.

### B. *The Coal Resource*

#### 1. Types of Coal

Types of coal are generally classified on the basis of fixed carbon or calorific value as:

- (1) *Anthracite* (hard coal) with an energy content of approximately 25 million BTU's per ton;

- (2) *Bituminous* with an energy content in the range of 21 to 28 million BTU's per ton;
- (3) *Subbituminous* with an energy content in the range of 16.6 to 23 million BTU's per ton; and
- (4) *Lignite* (brown coal) with an energy content in the range of 12 to 16.6 million BTU's per ton.<sup>1</sup>

Over 97 percent of the total identified reserves of anthracite found in the United States are in Pennsylvania, with minor reserves in Alaska, Arkansas, Colorado, New Mexico, and Virginia.<sup>2</sup> Bituminous coal, on the other hand, is found in thirty-two states, with major deposits in Colorado, Illinois, and West Virginia.<sup>3</sup> Subbituminous coal is found in at least eight states,<sup>4</sup> and the major reserves of lignite in the United States are found in North Dakota and Montana.<sup>5</sup>

## 2. Surface and Underground Coal Resources

Energy fuels are generally quantified as either total resources<sup>6</sup> or reserves, the latter being comprised of resources that may be currently available under existing economic and technological conditions.<sup>7</sup> The World Energy Conference in 1974 estimated that the United States retains 57 percent of the total world *resources* of coal.<sup>8</sup> Further, it is estimated that the United States retains over 30 percent of the total *recoverable reserves* in the world.<sup>9</sup>

Of the 437 billion tons of coal reserves in the United States, 300 billion tons are recoverable by underground mining methods, while 137 billion tons can be reached by surface mining methods.<sup>10</sup> Despite the fact that underground coal reserves total more than twice the recoverable surface coal reserves, half of the coal production in the United States from 1971 through 1975 was from surface mines.<sup>11</sup> A variety of factors contribute to the coal industry's preoccupation with surface mining techniques. The primary reason is the increased productivity per man/day that surface mining enjoys over underground mining. For example, a person working on a surface mine in 1975 produced 30 short tons of coal as compared with 9.5 short tons for

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1. ASTM STANDARDS - PART 19, STANDARD SPECIFICATION FOR CLASSIFICATION OF COALS BY RANK, ASTM DESIGNATION D 388-66 (1972).

2. U.S. GEOLOGICAL SURVEY, BULL. NO. 1412, COAL SOURCES OF THE UNITED STATES 81 (1974).

3. *Id.* at 30.

4. *Id.* at 42. Note, these states include Alaska, Colorado, Montana, New Mexico, Oregon, Utah, Washington, Wyoming.

5. *Id.* at 81. Montana and North Dakota combined contain 96.8 percent of the total U.S. reserves of lignite.

6. "Total resources" are materials that have present or future value and comprise identified or known materials plus those not yet identified, but which on the basis of geologic evidence are presumed to exist. U.S. GEOLOGICAL SURVEY, BULL. NO. 1450-A, PRINCIPLES OF THE MINERAL RESOURCES CLASSIFICATION SYSTEM OF THE U.S. BUREAU OF MINES AND THE U.S. GEOLOGICAL SURVEY A-1 (1976).

7. *Id.*

8. A. McRAE & J. NUDUS, THE ENERGY SOURCEBOOK 308 (1976) [hereinafter cited as ENERGY SOURCEBOOK].

9. *Id.*

10. BUREAU OF MINES, U.S. DEP'T OF INTERIOR, DEMONSTRATED COAL RESERVE BASE OF THE UNITED STATES BY SULFUR CATEGORY 32 (1975).

11. ENERGY SOURCEBOOK, *supra* note 8, at 303.

someone working in an underground mine.<sup>12</sup> Additionally, the requirements of the federal Clean Air Act<sup>13</sup> make low-sulfur coal reserves extremely attractive, particularly in the West where massive reserves of coal lie near the surface.<sup>14</sup>

### 3. Relation to Other Energy Resources

In spite of the massive coal reserves this country retains, coal is used to meet a disconcertingly small portion of the country's energy demands. Figure 1 shows this surprising disparity.<sup>15</sup> While over 90 percent of the energy reserve base of the United States is comprised of coal, it provided only 18 percent of the country's energy demand in 1977. The imbalance between use of limited oil and gas resources and coal is caused by the distinctive properties of petroleum and natural gas, which permit these products to be produced, transported, stored, and used in ways that are cheaper, easier, safer, and cleaner than coal.

The domestic supplies of both oil and natural gas, however, are dwindling so rapidly that they may be exhausted early in the 21st Century. The fact that this country possesses over half of the world's known coal resources (a figure that far exceeds the energy equivalent of the petroleum reserves owned by the members of the Organization of Petroleum Exporting Countries) serves as the primary foundation for our current preoccupation with coal. Recognition of our great coal wealth, however, does nothing to bring this nation closer to energy independence. The increasing vulnerability of our economic system to the vagaries of the imported oil market mandates that we develop our most abundant energy resource as rapidly as possible without sacrificing environmental and societal values. The new FCMP is the latest federal attempt to balance this country's interest in economic, environmental, and socio-economic well-being in relation to development of our coal resources.

### C. *Federal Coal—A Western Phenomenon*

#### 1. The Public Land States

The federal government plays a major role in the daily lives of every citizen to one extent or another. The significance of that federal role increases geometrically in the western "public land states" where the federal sovereign owns a major part of the real estate. As a percentage of the total land acreage in the 13 states west of the 100th meridian, the amount of federally owned and managed land varies from a comparatively insignificant 9.9 percent in Hawaii to an astronomical 87.6 percent and 90.5 percent in

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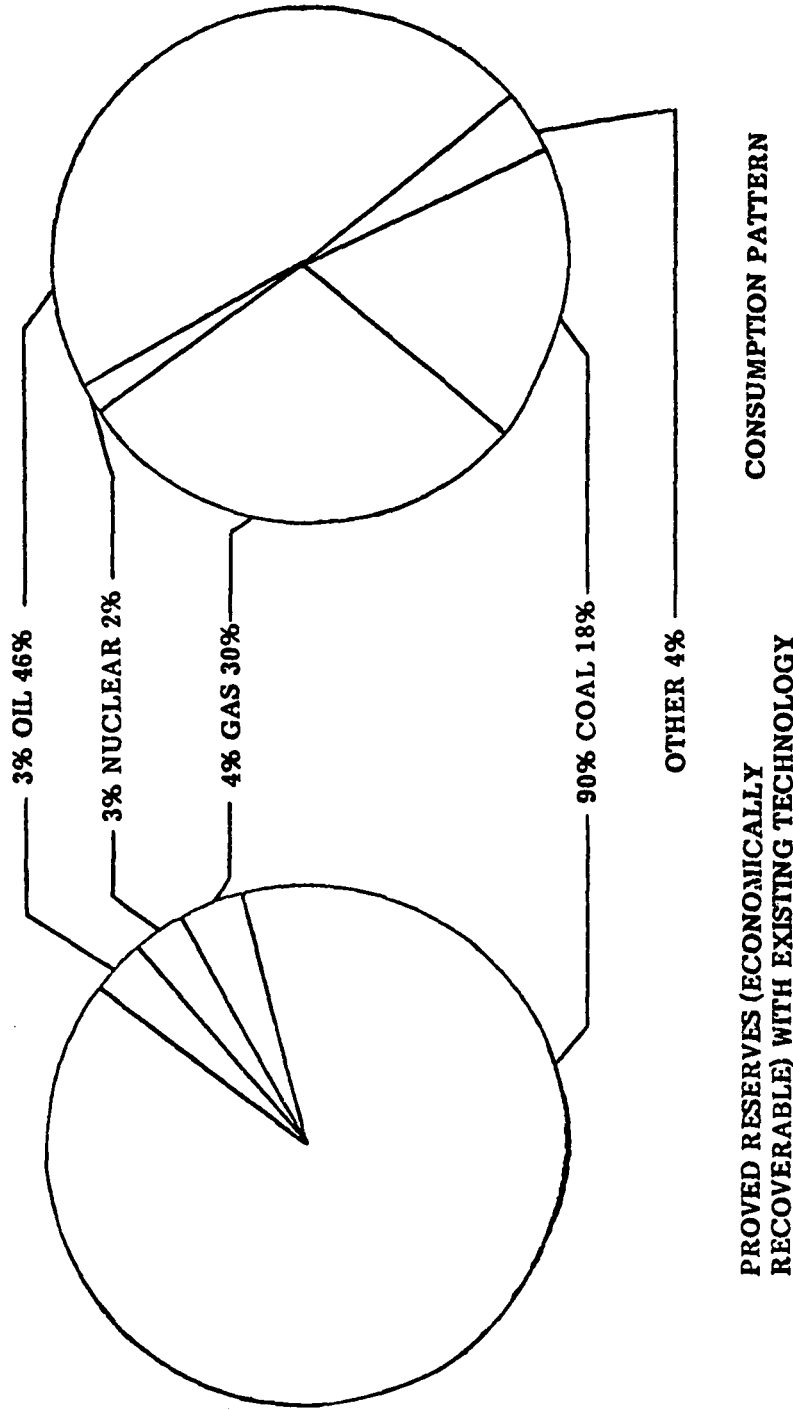
12. *Id.*

13. 42 U.S.C. §§ 7401-7642 (1976), *amending and recodifying* the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-1858 (1976).

14. ENERGY SOURCEBOOK, *supra* note 8, at 301, 302.

15. ENERGY SOURCEBOOK, *supra* note 8, at 240. For an extensive discussion of the estimated resources, problems, and promise of U.S. coal production *see*, U.S. GENERAL ACCOUNTING OFFICE, NO. EMD-77-43, U.S. COAL DEVELOPMENT-PROMISES, UNCERTAINTIES (1977).

**FIGURE 1**



Nevada and Alaska, respectively.<sup>16</sup> The ten other western states and the percent of federally owned land in each are:<sup>17</sup>

<u>State</u>	<u>% Federal Lands</u>
Arizona	44.1%
California	46.1%
Colorado	35.5%
Idaho	63.7%
Montana	29.6%
New Mexico	33.4%
Oregon	52.4%
Utah	65.1%
Washington	29.0%
Wyoming	48.6%

The one other state with significant federal land and federal coal resources is North Dakota, with federal land areas totaling 5.3 percent of the total land acreage of the state.<sup>18</sup>

The cumulative figures for coal resources in the United States total nearly 1.6 trillion short tons of all four varieties of coal—anthracite, bituminous, subbituminous, and lignite.<sup>19</sup> Of the fourteen public land states listed above, ten contain nearly 60 percent of the 1.6 trillion tons of U.S. coal resources.<sup>20</sup> Figure 2 identifies the coal fields of the United States.<sup>21</sup> As indicated in the figure, western coal fields are located principally in the Rocky Mountain states and the Northern Great Plains region.

## 2. Federal Lands Coal Production

Fifty-four percent of the total coal reserves in the United States are located west of the Mississippi River.<sup>22</sup> More significantly however, over 99

16. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS 10 (1977) [hereinafter cited as PUBLIC LAND STATISTICS].

17. *Id.*

18. *Id.* Including Alaska and Hawaii, the gross area of the United States is 2.3 billion acres. The federal government has, at various times in its history, held title to about four-fifths of the nation's gross area. Today, federal civil and defense agencies administer about 762 million acres, or about one-third of the gross area.

The Bureau of Land Management in the Department of Interior has exclusive responsibility for about 60 percent, or 427 million acres, of federally owned lands. More than half of this area is in the state of Alaska.

Other major land holding agencies in the Department of Interior include the National Park Service, Fish and Wildlife Service, and Bureau of Reclamation. The Forest Service, U.S. Department of Agriculture, has jurisdiction over 24 percent of the total federally owned land. See generally PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND, (1970) [hereinafter cited as ONE THIRD OF THE NATION'S LAND]; P.W. GATES & R.W. SWENSEN, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) [hereinafter cited as PUBLIC LAND LAW DEVELOPMENT].

19. Total estimated identified coal resources of 1,580,987,000,000 tons are distributed by coal types as follows:

*Bituminous* resources of 686,033,000,000 tons; *Subbituminous* resources of 424,073,000,000 tons; *Lignite* resources of 449,519,000,000 tons; and *Anthracite* and *Semi-anthracite* resources of 21,362,000,000 tons.

See P. AVERETT, COAL IN UNITED STATES MINERAL RESOURCES: U.S. GEOLOGICAL SURVEY, PROF. PAPER 820 (1973).

20. *Id.*

21. U.S. DEP'T OF INTERIOR, FEDERAL COAL MANAGEMENT REPORT, FISCAL YEAR 1979 (1980) [hereinafter cited as FISCAL 1979 COAL REPORT].

22. U.S. DEP'T OF INTERIOR, FINAL ENVIRONMENTAL STATEMENT - FEDERAL COAL MANAGEMENT PROGRAM 2-1 (1979) [hereinafter cited as FEDERAL COAL EIS].

percent of the *federal* coal resources and reserves are located west of the Mississippi River.<sup>23</sup> These federal reserves, until recently, played only a limited role in the nation's coal production. Western coal production has increased rapidly in the past few years, however, and this upward trend is expected to continue as coal becomes an increasingly important contributor to this country's energy supplies for electric power generation and synthetic fuel development.

About 60 percent of all western coal is owned by the federal government, with another 20 percent of coal reserves dependent on the availability of federal coal for its production.<sup>24</sup> Western coal, and thus federal coal, is expected to grow in importance in our nation's coal production. This increased importance stems primarily from the facts that (1) the proportion of surface mineable coal reserves in the West is significantly larger than for the nation as a whole, and (2) western coal reserves are significantly lower in sulfur content than eastern coal, thus making western coal more attractive for purposes of meeting restrictions imposed by the federal Clean Air Act.<sup>25</sup> For example, 74 percent of the *surface mineable reserves* are located west of the Mississippi River.<sup>26</sup> Western reserves occur in thicker beds with less overburden, resulting in relatively lower mining costs. Generally, coal with less than one percent sulfur by weight is considered "lower sulfur" coal. Whereas only 16 percent of eastern coal is considered lower sulfur, 71 percent of western coal falls into this category.<sup>27</sup> Thus, 84 percent of the nation's low sulfur coal is located in the West.<sup>28</sup>

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23. U.S. DEP'T OF INTERIOR, FEDERAL COAL MANAGEMENT REPORT, FISCAL YEAR 1978, at 4 (1979) [hereinafter cited as FISCAL 1978 COAL REPORT].

24. FEDERAL COAL EIS, *supra* note 22, at 2-1. This additional 20 percent of non-federal coal is dependent upon the availability of federal coal principally because of the interspersed and checkerboarded nature of federal, state, Indian, and private fee lands. The checkerboarded nature of land holdings in the West is the result of the tortured history of public land settlement and disposition over the 200 years of this nation's existence. A brief history of public land development in the United States is provided by the Public Land Law Review Commission in its report to the President and the Congress in 1970. See ONE THIRD OF THE NATION'S LAND, *supra* note 18, at 28.

25. Sulfur content is a key factor in assessing the value of coal. The sulfur content of coal in the United States generally ranges from 0.2 to 7.2 percent by weight. The presence of sulfur lowers the quality of coke and the resulting iron and steel products. Sulfur also contributes to corrosion and to the formation of boiler deposits. Sulfur compounds may react with water to form sulfuric acid, which is one of the major deleterious substances in acid mined waters contributing to stream pollution. Most importantly, sulfur compounds are a major source of air pollution, particularly in the form of sulfur dioxide (SO<sub>2</sub>).

Industrial interest in development and use of "low-sulfur" coal reserves stems primarily from the limitations imposed by the Clean Air Act on the emission of SO<sub>2</sub> from industrial air pollution sources such as coal-fired electric power plants.

The statutory framework for regulating air pollution starts with the directive to the U.S. Environmental Protection Agency to identify pollutants and their known control techniques. Determination of the levels in ambient air at which these pollutants could be conservatively demonstrated to have health or welfare impacts resulted in promulgation of primary and secondary national ambient air quality standards (NAAQS). NAAQS have been issued for sulfur oxides, particulate matter, carbon monoxide, hydrocarbons, photochemical oxidants, nitrogen dioxide, and lead. Parish, *Enforcement and Litigation under the Clean Air Act Amendments of 1977*, 9 NAT. RESOURCES LAW. 435, 455-70 (1979). See also Quarles, *Federal Regulation of New Industrial Plants*, 10 ENV. L. REP., MONOGRAPH NO. 28 (1979).

26. FEDERAL COAL EIS, *supra* note 22, at 2-2.

27. *Id.* at 2-5.

28. *Id.*



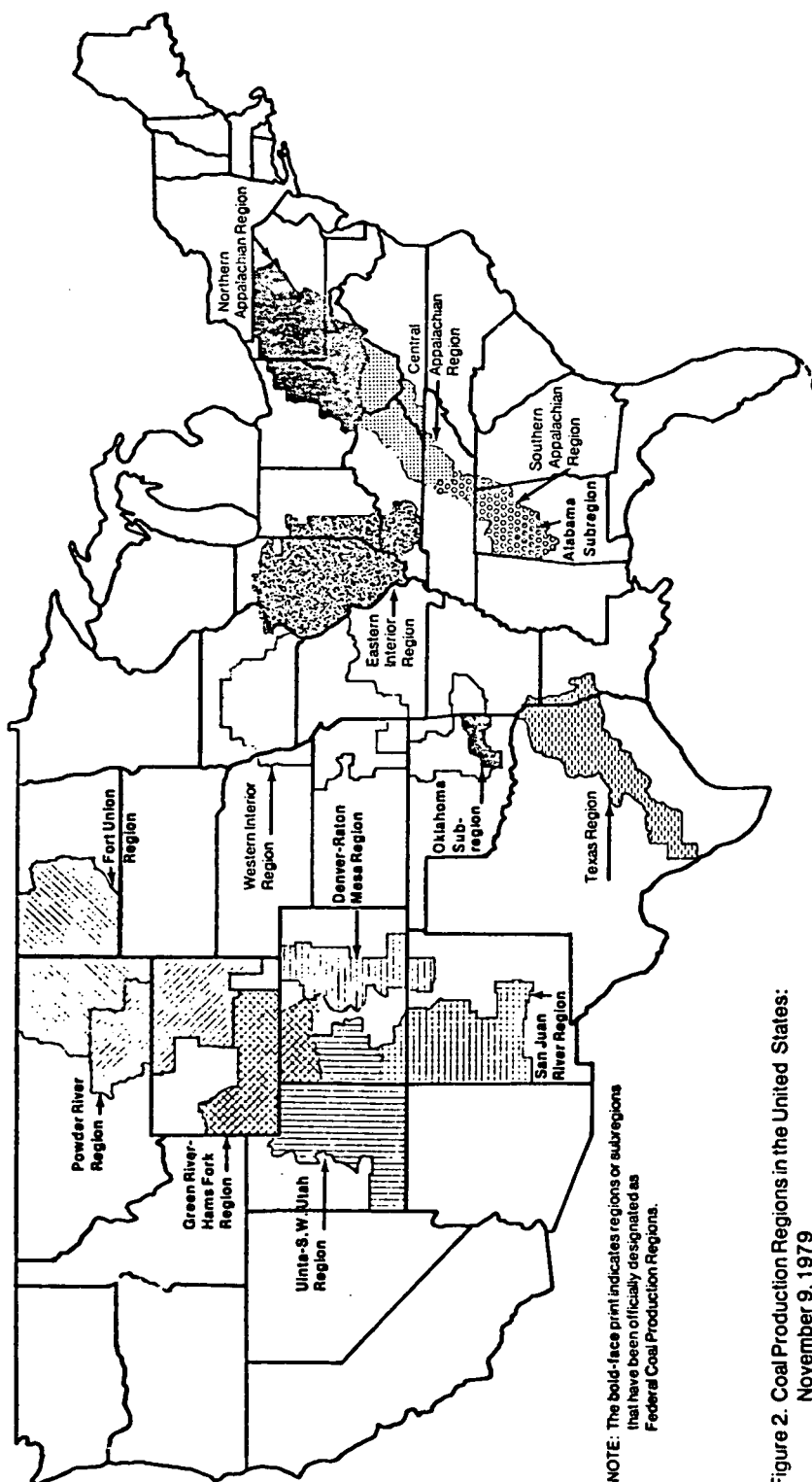


Figure 2. Coal Production Regions in the United States:  
November 9, 1979

Federally owned coal is concentrated in six western states—Colorado, Montana, New Mexico, North Dakota, Utah, and Wyoming. In 1977, these six states accounted for 71 percent of the production of all western coal.<sup>29</sup> Of the twelve coal regions recently established by the Department of Interior for purposes of developing the Federal Coal Management Program,<sup>30</sup> the federal government administers large quantities of coal in six of these regions: the Fort Union, Powder River, Green River-Hams Fork, Uinta-Southwestern Utah, San Juan River, and Denver-Raton Mesa coal regions. Smaller quantities of federal coal are located in three other regions: the Western Interior, Central, and Southern Appalachian regions. Generally, it is these nine regions that are the functional geographic areas for the new FCMP.<sup>31</sup>

Of total coal reserves in the West, approximately two-thirds (66 percent) are located in the Powder River coal region. Other major coal regions include Fort Union (11 percent), Western Interior (7 percent), and the

29. *Id.* at 2-1. Other federal coal is located in Oklahoma, Alabama, Washington, Kentucky, and in small amounts in other states. Production of federal coal in these areas could be significant regionally or for specialized types of metallurgical or coking coal. *See* FEDERAL COAL EIS, *supra* note 22, at 2-1.

30. The data for the regional and U.S. demonstrated coal reserve base and production levels are presented in the following table contained in the FEDERAL COAL EIS, *supra* note 22, at 2-3.

COAL REGION	RESERVE BASE (millions of tons)			PRODUCTION 1976 (thousands of tons)		
	UNDER- GROUND	SURFACE	TOTAL	UNDER- GROUND	SURFACE	TOTAL
Appalachian						
Northern	59,266	6,292	65,558	92,028	83,931	175,959
Central	27,321	7,589	34,910	125,928	80,889	206,817
Southern	1,963	250	2,213	8,605	14,783	23,388
Eastern Interior	71,110	17,801	88,911	55,366	81,075	136,441
Western Interior	10,125	4,467	15,592	339	11,111	11,450
Texas	0	3,271	3,271	0	15,063	14,063
Powder River	86,500	56,024	142,524	119	37,290	37,409
Green River-Hams Fork	13,396	2,147	15,543	768	24,916	25,684
Fort Union	0	23,101	23,101	0	11,414	11,414
San Juan River	1,906	2,258	4,164	17	8,824	8,841
Uinta-Southwestern Utah	6,915	262	7,177	10,144	0	10,144
Denver-Raton Mesa	3,865	0	3,865	1,453	409	1,862
Total of 12 Regions	282,367	124,462	406,829	294,767	368,750	663,472
U.S. Total	296,976	141,361	438,337	294,771	383,914	678,685
Region as Percent of U.S.	95.1	88.3	92.8	100	96.0	97.8

31. *Id.* at 2-2.

Green River-Hams Fork (7 percent).<sup>32</sup> Until 1973, western coal production never exceeded 10 percent of the entire national production. Western production had risen to 27 percent of national production by 1978, however, and is continuing to grow rapidly. Western production rose by 23 percent in 1976, 22 percent in 1977, and 8 percent in 1978. In contrast, eastern production as a percentage of total national production rose by 1 percent in 1976 and then declined by 4 percent in 1977 and 9 percent in 1978.<sup>33</sup>

Growth in federal coal production has paralleled the growth in western coal production. In 1973, federal coal production constituted only 17 percent of total western production. By 1978, this percentage had doubled to a total of 34 percent. The rate of federal coal production growth has been rising rapidly, increasing 24 percent in 1976, 35 percent in 1977, and 15 percent in 1978, and thus reaching 9.2 percent of total national coal production in 1978 (60.2 million tons).<sup>34</sup>

Projections of future coal production have been developed for the Department of Interior (Interior or DOI) to serve principally as the foundation of the new FCMP. Interior asked the Leasing Policy Development Office of the U.S. Department of Energy (DOE) to prepare "Federal Coal Leasing and 1985 and 1990 Regional Coal Production Forecasts," which were released in June 1978.<sup>35</sup> The DOE projections incorporated assumptions on future electric power requirements, oil and gas prices, and nuclear power development. Other assumptions factored into the projections involved air quality controls, transportation costs, and labor cost escalation. The assumptions varied for *three scenarios* developed by DOE, which included *low*, *medium*, and *high* projections of western coal development. DOE used a computer model to develop the forecasts, which calculated the lowest cost method of providing electric power and coal use requirements for the country.<sup>36</sup>

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32. *Id.*

33. 2 U.S. DEP'T OF INTERIOR, SECRETARIAL ISSUE DOCUMENT, FEDERAL COAL MANAGEMENT PROGRAM 4 (1979) [hereinafter cited as SECRETARIAL ISSUE DOCUMENT].

34. *Id.*

35. U.S. DEP'T OF ENERGY, FEDERAL COAL LEASING AND 1985 AND 1990 REGIONAL COAL PRODUCTION FORECASTS (1978) [hereinafter cited as COAL PRODUCTION FORECASTS].

36. *Id.* Three scenarios were developed by the Department of Energy for each of the forecast target years 1985 and 1990. These scenarios represent the circumstances and policies that are expected to result in varying degrees of coal demand, *i.e.*, low coal demand, mid-range demand, and high demand. Next, forecasts from the Department of Energy's Project Independence Evaluation System (PIES model) were modified to obtain equilibrium forecasts of industrial sector energy prices and supply quantities consistent with the assumption specified in each scenario. Some modifications were made to the basic PIES forecast. Third, the PIES forecast of industrial sector prices in quantities, and the associated projection of industrial activity (consistent with the macro-economic assumptions in the scenarios), were analyzed by the Energy Environmental Analysis, Inc.'s model (the "EEA" model). The EEA model determines the industrial demand, by type, for coal in each demand center of the United States. Finally, the EEA coal demand forecast, along with the scenario-specific forecasts of electricity demand, were analyzed by the ICF, Inc. National Coal model to determine the regional coal production requirements necessary to supply the projected levels of coal demand. (A complete discussion of the methodology for developing national and regional coal production requirements is contained in COAL PRODUCTION FORECASTS, *supra* note 35, at 37-59.)

Coal production projections are subject to many major uncertainties. The recent increased oil supply instability in Iran, and the Middle East generally, and the nuclear accident at Three Mile Island have illustrated how energy fuel availability can change rapidly. Since the DOE

Because circumstances and assumptions changed since the initial development of the coal forecasts in 1978, DOE has prepared a new set of coal production projections based on adjusted assumptions and using a somewhat more technically refined computer model procedure. These 1979 DOE projections indicate overall national coal production will rise from 687.7 million tons in 1977 to 1.03 billion tons in 1985 and 1.46 billion tons in 1990.<sup>37</sup> DOE further projects a large-scale shift in the national distribution of coal production from the East to the West. The DOE projection shows western production increasing from 27 percent of national production in 1978 to 36 percent in 1985 and 47 percent in 1990.<sup>38</sup> This increase would bring western coal production in line with the western share of national coal reserves.

By far the greatest proportion of projected federal coal production will come from the Powder River region. By 1985, for example, DOE indicates approximately 50.6 percent of federal coal will come from this region, representing 21 percent of total national production.<sup>39</sup> The Green River-Hams Fork region contains the second largest share of projected federal coal production—27 percent for 1985. These two regions, then, account for 78 percent of total projected 1985 federal coal production.<sup>40</sup> The other four major coal producing regions (Fort Union, Uinta-Southwestern Utah, San Juan River, and Denver-Raton Mesa) are projected to have modest levels of production by 1985, ranging from less than 10 to approximately 30 million tons per year.<sup>41</sup> By 1990, DOE's most likely projections show an even greater concentration of federal coal production from the Powder River and Green River-Hams Fork regions, accounting for 88 percent of 1990 projected production. The most likely production for federal coal regions altogether would rise by approximately 118 percent in the five years from 1985 to 1990.<sup>42</sup>

These DOE projections contrast somewhat with a U.S. Geological Survey (GS) report published in March 1978 and updated in October 1978 list-

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projections were made in June 1978, a number of other important factors have changed. There has been a new recognition of the huge size and importance of Mexican oil and gas reserves and the significant oil and gas potential of the Overthrust Belt in the western United States. At least a temporary glut of natural gas developed in the United States over the last year, caused partly by the impact of the Natural Gas Policy Act of 1978 in shifting natural gas from the intrastate to the interstate market. Other factors, including overly optimistic projections for synthetic fuel development, rapidly rising railroad rates for transporting coal, new regulations for clean air, New Source Performance Standards for sulfur emissions, and a significantly lower electric power growth rate in 1978 as compared with earlier years acted to decrease projections of western coal production.

Because of the many changes in circumstances, the Department of Interior asked DOE to prepare a new set of updated 1979 projections to provide a basis for evaluating options for possible early federal coal lease sales. These updated projections were based on somewhat different computer modeling procedures as well as technical refinements in the DOE coal modeling. For a complete discussion of the updated DOE western coal projections, see SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 5.

37. SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 6.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

ing currently planned coal production by coal companies in 1985.<sup>43</sup> The GS study was based on mine plans for federal coal development either approved by or pending before GS. Currently planned production for 1985 in federal coal regions as a whole is 365 million tons. Confirming DOE projections, GS estimates the largest share of this planned production will occur in the Powder River region, which will produce approximately 219.1 million tons or 60 percent (compared to DOE's 50.6 percent) of all federal coal production in 1985.<sup>44</sup> Currently planned production for the Green River-Hams Fork and Uinta-Southwestern Utah regions total 49.8 and 47.2 million tons respectively.<sup>45</sup>

No attempt has been made to summarize the statistics for each of the federal coal regions.<sup>46</sup> However, the preceeding discussion has demonstrated that western and federal coal production will grow at astounding rates over the next ten years. Western states will be faced with significant environmental and socioeconomic impacts as a result. The future for coal and fossil fuel production becomes more clearly defined with each jump in world oil prices. The United States has more energy potential lying within its borders than the total of world oil resources. Excluding more exotic energy sources such as solar related resources, coal makes up the greatest portion of that resource base and will undoubtedly be perceived as the most readily attainable answer to our energy woes, particularly over the next fifteen to twenty years. The federal government fully intends to take advantage of its coal wealth in the West and is in the midst of implementing a federal coal leasing and management system that will attempt to balance energy production goals with its concurrent interests in maintaining social and environmental integrity. This recently developed federal coal management system, including its history, implementation and problems, provide the substance of this article.

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43. U.S. DEP'T OF INTERIOR, BUREAU OF MINES INFO. CIR. 8772, PROJECTS TO EXPAND ENERGY SOURCES IN THE WESTERN STATES - AN UPDATE OF INFO. CIR. 8719 (1978).

44. SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 9.

45. *Id.* In addition to currently planned production, other potential sources of production that do *not* depend on a new federal coal leasing include production from existing federal leases and production from Indian and other non-federal lands, for which there are at present no mine plans.

Fifty-four percent of existing federal lease reserves—generally those of highest quality—have already been committed to currently planned mines. The remaining reserves in existing leases provide potential for further production without any new federal leasing. Many of these reserves, however, are poorly located, contain poor quality coal, are in leases too small to be developed by themselves, have environmental problems, or have other developmental problems.

In the federal coal regions, Indian and other non-federal reserves constitute about 30% of total coal reserves. Major Indian coal reserves are owned by the Crow and Cheyenne Tribes in the Montana part of the Powder River region and by the Navajo Tribe in the San Juan River region. There is a high potential for production of Indian coal, but also many major uncertainties. The Cheyenne Tribe has indicated that for the time being at least it opposes coal development on its reservation. Existing coal leases on the Crow reservation are presently in litigation.

Other non-federal coal also faces important limitations on its production potential. More than one-third of the non-Indian, non-federal coal is in checkerboard areas where it should be developed jointly with federal coal. Considerable additional non-federal coal is scattered in small irregular parcels, which also require acquisition of complementary federal coal to be developed. In all, less than 50 percent of non-federal coal is estimated to be developable without the availability of complementary federal coal. *Id.* at 13-21.

46. Summary coal data tables for each of the six major western coal regions are provided as Appendix A at the end of this article.

## II. HISTORY OF FEDERAL COAL LEASING

### A. *Moratorium on Leasing—1971*

Coal development on federal lands was governed between 1873 and 1920 by a law controlling land entry and sale.<sup>47</sup> Under this law, a maximum of 160 acres could be granted to an individual; up to 640 acres were allowed to groups of four or more persons who could 1) making a showing of an expenditure of at least \$5,000 in work and improvements, 2) identify where mines had been opened and improved, and 3) state the date when the group had taken actual possession of the land.<sup>48</sup> After fulfilling the above criteria, an individual who discovered coal on public domain land could purchase and receive title to the mineral.<sup>49</sup>

Congress enacted a radical policy change for disposal of federal coal lands when it passed the Mineral Leasing Act of 1920.<sup>50</sup> Federal coal was no longer available for sale, and an individual was required to obtain a prospecting permit and lease issued by the Department of Interior in order to obtain the right to explore for, develop, and remove the coal.<sup>51</sup> In the fifty

47. 17 Stat. 607 (1873), *superseded by* the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976).

48. *Id.*

49. *Id.* For general discussions of early coal legislation, see B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 518-25 (1924) (1965 reprint); ROBBINS, OUR LANDED HERITAGE 223, 346, 370-71 (1960); PUBLIC LAND LAW DEVELOPMENT, *supra* note 18, at 724-30.

50. 30 U.S.C. §§ 181-287 (1976).

51. *Id.* § 201. Coal prospecting permits were issued by the Department of the Interior only in areas where no known coal deposits existed. The permit granted the exclusive right to the holder to prospect for coal. Each permit had an initial two-year term, but could be extended for an additional two years if the permittee were unable, with the exercise of reasonable diligence, to determine the existence or workability of coal deposits in the permit area. Permittees were entitled to preference right leases if they could demonstrate that the lands contained coal in commercial quantities.

Lands containing known coal deposits were *not* subject to prospecting permits. Instead, the lands were divided into leasing tracts and leases were awarded competitively. The competitive leasing system adopted by Interior was designed to award leases to the highest bidder. A lump sum cash bonus was collected at the time the lease was awarded.

The Mineral Leasing Act of 1920 restricted the acreage that could be held by one party in one state. Originally, the law allowed only one lease per person in each state. The limits were raised several times until, in 1964, they allowed a holding by any person of up to 46,080 acres (approximately 72 square miles) in one state.

The Act also required that leases be issued for an indeterminate period as long as conditions of diligent development and continuous operations were satisfied. These conditions could be waived if operations were interrupted by strikes, the elements, or casualties not attributable to the holder of the lease. Lease terms and conditions became subject to readjustment at the end of 20-year periods. In addition, leases could not be assigned or sublet without the consent of the Department.

Other major provisions of the Act include:

- (1) Leases could be modified by an additional 2,560 contiguous acres;
- (2) Additional tracts up to 2,560 acres could be leased if workable deposits of coal would be exhausted within 3 years;
- (3) Single leases could contain noncontiguous tracts;
- (4) Royalties were set at not less than five cents a ton of coal;
- (5) Annual rentals were set at not less than 25 cents, 50 cents, and one dollar for the first, third through fifth, and sixth year onward from lease issuance, respectively; and,
- (6) Limited licenses or permits could be issued to municipalities (without royalties) if the coal mined was sold without profit to local residents.

See scattered sections contained at 30 U.S.C. §§ 201-209 (1976).

years between passage of the act in 1920 and 1970, Interior issued coal leases on federal land almost automatically to anyone who requested such leases. Lease requests were processed on a case-by-case basis. In essence, little consideration was given to the total federal coal reserves under lease or the generic need for additional leasing. Further, the environmental impacts of coal production under the terms of the lease were not addressed.

A study issued in 1970 by the Bureau of Land Management (BLM), *HOLDINGS AND DEVELOPMENT OF FEDERAL COAL LEASES*, reported that, although federal coal acreage under lease grew from roughly 80,000 acres in 1945 to approximately 788,000 acres in 1970 (nearly a ten-fold increase), federal coal production had actually dropped from 10 million tons in 1945 to 7.4 million tons in 1970.<sup>52</sup> Thus, over 90 percent of the total coal acreage under lease was not producing coal. Similar conclusions indicating the strongly speculative nature of federal coal leasing in years prior to the early 1970's were reached in a report prepared by the Council on Economic Priorities in 1974.<sup>53</sup> Therefore, the Secretary of Interior in 1971 informally ordered the BLM to stop issuing federal coal leases and prospecting permits under the requirements of the Mineral Leasing Act of 1920. This informal moratorium continued for nearly two years as Interior debated which course to follow to renew federal coal leasing.<sup>54</sup>

#### B. *Short-Term Leasing Criteria—1973*

The informal moratorium initiated in 1971 was replaced on February 17, 1973, with a limited coal leasing policy designed to provide needed reserves to continue existing mine operations and to supply existing markets.<sup>55</sup> At the time the short-term leasing policy was announced, the Interior committed itself to preparing an environmental impact statement to examine the effects of the continuation of the existing program and development of a new coal leasing policy for public lands.

Long-term actions initiated by the department were designed to develop comprehensive planning systems to determine the size, timing and location of future coal leases. Short-term actions included the moratorium on the issuance of new prospecting permits and the near-total moratorium on the issuance of new federal coal leases. This short-term policy was outlined in BLM instructions implemented in July 1973.<sup>56</sup> In essence, the instructions authorized the issuance of new leases based on a showing that the proposed lessee needed coal to satisfy an existing market or intended to begin

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52. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, *HOLDINGS AND DEVELOPMENT OF FEDERAL COAL LEASES* (1970).

53. 5 COUNCIL ON ECONOMIC PRIORITIES No. 1, *LEASED AND LOST* (1974).

54. FEDERAL COAL EIS, *supra* note 22, at 1-9. The informal *leasing* moratorium was followed by a formal Secretarial order on February 17, 1973, which placed a moratorium on the further issuance of coal *prospecting permits*. Secretary Morton emphasized that all pending applications for such prospecting permits would be rejected but that the order would not adversely affect the rights of current permit holders nor their opportunity to receive a preference right lease upon a showing of commercial quantities. U.S. DEP'T OF INTERIOR, INTERIOR SECRETARY ORDER NO. 2952 (1973).

55. *Id.*

56. *Id.* at 1-10.

development of federal coal within three years of the issuance of the lease. Ten leases covering 30,246 acres were issued between 1974 and April 1, 1978. Most of these leases were for extensions of existing operations, and seven of the leases were producing coal by the end of 1977.<sup>57</sup>

C. *The Coal Programmatic EIS and EMARS—1975*

On May 9, 1974, the Department of Interior published the draft programmatic Environmental Impact Statement (EIS) describing DOI's newly proposed coal leasing system. The final EIS was issued in 1975.<sup>58</sup> The department's final EIS outlined three essential phases of the revised leasing system: (i) nominations and programming, (ii) scheduling, and (iii) leasing. Essentially, nominations were to be accepted from the industry for any area, with information on where and how much to lease provided by the industry. At the same time, public identification of areas of concern (dis-nominations) would also be provided. Following the nominations and dis-nominations, Interior proposed to prepare land use plans and environmental analyses designed to resolve and mitigate resource conflicts and to hold lease sales where coal development was found to be compatible with the environment.<sup>59</sup>

In January of 1976, then Secretary of the Interior Kleppe announced a new federal coal leasing policy. The policy included:

- (1) The adoption of the Energy Minerals Activity Recommendation System (EMARS II);
- (2) The adoption of a totally competitive leasing system;
- (3) The establishment of final regulations setting conditions for mining;
- (4) The preparation of environmental impact statements on a regional basis;
- (5) Continuation of the short-term leasing criteria;
- (6) The issuance of diligent development requirements;
- (7) The development of commercial quantities criteria to determine whether existing preference right lease applications should be granted; and
- (8) Official lifting of the five-year moratorium on leasing of federal coal.<sup>60</sup>

A virtual flood of public criticism followed the issuance of the final EIS in September of 1975 and Secretary Kleppe's announcement in January 1976 of the new federal coal leasing policy. A suit was filed shortly after release of the final EIS by the Natural Resources Defense Council (NRDC) in U.S. District Court for the District of Columbia against then Assistant Secretary of Interior Royston Hughes.<sup>61</sup>

Major criticism of DOI's new coal program stemmed from concern that

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57. *Id.*

58. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, ENVIRONMENTAL IMPACT STATEMENT: PROPOSED FEDERAL COAL LEASING PROGRAM (1975).

59. *Id.* at 1-4.

60. FISCAL 1978 COAL REPORT, *supra* note 23, at 5.

61. NRDC v. Hughes, 437 F. Supp. 981 (D.D.C. 1977), *modified*, 454 F. Supp. 148 (D.D.C. 1978). See text accompanying notes 112-20 *infra*.



alternatives to increased federal coal leasing were not considered and that enough federal coal was already under lease to meet immediate needs for the future. Commentators also expressed considerable uncertainty as to whether the program had been adequately described or that leasing goals and plans had been adequately defined. Criticism was generated from both industry and environmental representatives who were concerned that the new program could not resolve conflicts with a reasonable degree of certainty and with clearly identifiable consequences.<sup>62</sup>

#### D. *Legislation, Regulations, and Lawsuits*

##### 1. Legislation

a. *The Federal Coal Leasing Amendments Act.* While Interior was developing the new coal program, Congress was debating coal-related amendments to the Mineral Leasing Act of 1920. The amendments were designed to provide an orderly procedure for leasing and development of federal coal resources and to assure federal coal was developed in a manner more compatible with the public interest. Congress enacted the Federal Coal Leasing Amendments Act of 1975 (FCLAA), overriding President Ford's veto.<sup>63</sup> Three major impacts on coal leasing resulted from the FCLAA. First, the Act eliminated the authority of DOI to issue noncompetitive coal leases through the prospecting permit-preference right lease procedure.<sup>64</sup> Second, the Act mandated the preparation of a comprehensive land use plan before issuance of new coal leases.<sup>65</sup> Finally, the Act revised federal coal lease terms and strengthened diligent development requirements by setting a fixed term for development of coal leases.<sup>66</sup>

b. *Federal Land Policy and Management Act of 1976.* Congress, over the years, had passed a tremendous number of public land laws which governed the management and disposal responsibilities for a variety of federal land managing agencies. A review of these laws in the late 1960's by the Public Land Law Review Commission (PLLRC) resulted in its recommendation to the President and Congress that the majority of the statutes be revised and a clear set of goals established for the management and use of public lands.<sup>67</sup> Although the work of the PLLRC has affected the activities of all federal land management agencies to some extent, perhaps the most significant outcome of the Commission's report was the passage of the Federal Land Policy

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62. *Id.* 437 F. Supp. at 983.

63. 30 U.S.C. §§ 201-214 (1976). In his veto message to the Senate returning the Federal Coal Leasing Amendment Bill, President Ford stated, "S. 391 is also littered with many other provisions which would insert so many rigidities, complications, and burdensome regulations in Federal leasing procedures that it would inhibit coal production on Federal lands, probably raise prices for consumers, and ultimately delay our achievement of energy independence." 12 WEEKLY COMP. OF PRES. DOC., VETO OF THE FEDERAL COAL LEASING AMENDMENTS BILL, 1121 (1976).

64. *Id.* § 201(a)(1).

65. *Id.* § 201(3)(A)(i).

66. *Id.* § 202(a).

67. ONE THIRD OF THE NATION'S LAND, *supra* note 18.

and Management Act of 1976 (FLPMA).<sup>68</sup>

BLM has responsibility within Interior for the vast majority of public lands in the country, managing approximately 60 percent of all federal lands.<sup>69</sup> BLM's land management practices, then, received the greatest attention from the passage of the FLPMA. Title II of FLPMA provides the statutory framework for land use planning of public lands under BLM control.<sup>70</sup> The principal factors for the development of BLM land use plans include:

- i. Application of the multiple use and sustained yield principles;<sup>71</sup>
- ii. Recognition that the protection of areas of critical environmental concern should receive top priority for historic, cultural, or scenic values as well as fish and wildlife resources;
- iii. Consideration of present as well as future public land uses; and
- iv. Coordination of BLM planning activities with other federal, state and local agencies.<sup>72</sup>

c. *Surface Mining Control and Reclamation Act of 1977.* Congress passed the first comprehensive federal statute to regulate the surface impacts of coal mining on a national scale through the Surface Mining Control and Recla-

68. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976) [hereinafter cited as FLPMA].

69. PUBLIC LAND STATISTICS, *supra* note 16, at 31.

70. FLPMA, *supra* note 68, at § 1712 (Supp. 1979).

71. FLPMA defines the term "multiple use" as:

[T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical value; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c) (1976).

The term "sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use. 43 U.S.C. § 1712(h) (1976).

The definitions of "multiple use" and "sustained yield" preserve essentially their same meaning as used in the Forest Service Multiple Use Act of 1960 and in the now-expired Public Land Classification and Multiple Use Act of 1964. *See* H.R. REP. NO. 1163, 94th Cong., 2d Sess. 5 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6179.

72. FLPMA, *supra* note 68, at §§ 1711-1722 (1979). The implementation of FLPMA and its impacts on public land policy and management have been examined in several recent articles including: Kapaloski, *Power Plant Siting on Public Lands: A Proposal for Resolving the Environmental-Development Conflict*, 56 DEN. L.J. 179 (1979); *Symposium: The Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 331 (1979); Morrison, *Rights-of-way on Federally Owned Land: A Journey Through the Statutes by Way of the Federal Land Policy and Management Act of 1976*, 9 TRANSP. L.J. 97 (1977); Olson, *Toward a Public Lands Ethic: A Crossroads in Publicly Owned Natural Resources Law*, 56 U. DET. URB. L. 739 (1977); *Federal and State Cooperation in the Management of Public Lands*, 5 J. CONT. L. 149 (1978); *Symposium—Public Land Law*, 54 DEN. L.J. 281 (1977).

mation Act of 1977 (SMCRA).<sup>73</sup> The regulatory scope of SMCRA is limited to surface coal mining and the surface effects of underground coal mining.<sup>74</sup> SMCRA establishes a uniform national program for reclaiming surface areas affected by coal mining on federal, Indian, state and private fee lands. As such, SMCRA preempts state, Indian and local regulation of reclamation activities on all coal lands in the United States. Nevertheless, the individual states and Indian tribes are recognized as the primary regulatory authorities for implementation of SMCRA.<sup>75</sup>

SMCRA has a variety of requirements which are directly relevant to the new federal coal program. Of particular importance are the environmental protection performance standards established in Title V of the act and more specifically in Section 515.<sup>76</sup> The following is a list of standards required of coal operators by this section:<sup>77</sup>

- (1) Conduct operations to maximize utilization and conservation of the coal resource;
- (2) Restore the land to a condition at least capable of supporting premining uses;
- (3) Backfill and compact the area affected to restore the land to the approximate original contour. Exceptions are permitted in certain situations for backfill and compaction to achieve the lowest practicable grade or the lowest grade, neither of which may be more than the angle of repose;
- (4) Stabilize and protect surface areas to effectively control erosion and attendant air and water pollution;
- (5) Remove and segregate layers of topsoil or other strata which are best able to support vegetation;
- (6) Restore the topsoil or the best available subsoil which is best able to support vegetation;
- (7) Segregate, replace, and redistribute natural soil on prime farmlands under rules to be established by the Secretary of Agriculture;
- (8) Construct and manage permanent water impoundments according to detailed guidelines;
- (9) Conduct augering operations to maximize coal slurry recovery and seal all auger holes with impervious and noncombustible material;
- (10) Minimize disturbances to the hydrologic balance at the mine-site and off-site areas and to the quality and quantity of water;
- (11) Stabilize, regrade, and revegetate waste piles;
- (12) Preclude surface mining within 500 feet of underground mining operations (exceptions are permitted in certain situations);
- (13) Design, construct, and remove all existing and new coal

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73. 30 U.S.C. §§ 1201-1328 (Supp. II 1978).

74. H.R. REP. NO. 218, 95th Cong., 1st Sess. 57-60, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 595-97.

75. 30 U.S.C. § 1300 (Supp. II 1978).

76. *Id.* § 1265.

77. The numbers herein correspond to the numbers in § 515(b) of SMCRA, 30 U.S.C. § 1265(b) (Supp. II 1978).

- waste piles according to standards set by the Secretary of Interior after consultation with the Chief of Engineers of the U.S. Army;
- (14) Insure that all potentially fire-hazardous materials are buried or otherwise disposed of;
  - (15) Insure that explosives are used only according to state and federal laws;
  - (16) Insure that all reclamation efforts proceed in an environmentally sound manner simultaneously with the surface coal mining operation;
  - (17) Insure that access roads are constructed and maintained to prevent erosion and damage to water, wildlife or public and private property;
  - (18) Refrain from construction of roads or access ways up stream beds or so close to channels as to seriously alter the normal flow of water;
  - (19) Revegetate all affected lands with the same premining or better cover;
  - (20) Assume responsibility for revegetation for five full years from the last year of augmented seeding, fertilization, irrigation or other work. Where the average annual precipitation is 26 inches or less, this responsibility lasts for ten full years;
  - (21) Protect off-site areas;
  - (22) Place and manage all excess spoil material;
  - (23) Meet other criteria necessary to achieve reclamation according to SMCRA, taking physical, climatological, and other site-specific characteristics into account.
  - (24) Use the "best technology currently available" to the extent possible to minimize disturbances and adverse impacts of the operations on fish, wildlife, and related environmental values, and enhance these resources where practicable; and
  - (25) Provide a natural barrier to slides and erosion.<sup>78</sup>

Section 522 establishes procedures to designate lands unsuitable for coal mining operations.<sup>79</sup> The provisions of this section are prospective in that they do not apply where surface coal mining operations were being conducted on August 3, 1977 (date of enactment of SMCRA), or where "substantial legal or financial commitments" were in existence prior to January 4, 1977.<sup>80</sup> The Secretary of Interior determines unsuitability on federal lands, and the states have authority to determine unsuitability for non-federal lands.<sup>81</sup> Areas on both federal and non-federal lands are designated unsuitable following a petition filed by any interested person.<sup>82</sup> Specific cri-

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78. Certain exceptions to the requirement to return the mined areas to the approximate original contour are provided in circumstances involving mountain top mining, as well as in cases where an industrial, commercial, agriculture, residential, or public facility use is proposed for the post-mining use. Finally, certain additional performance standards are provided for steep-slope mining. Steep-slope operations are defined as mining taking place on any slope above 20 degrees, or such lesser slope, as determined by the regulatory authority. *See* 30 U.S.C. § 1265(c), (d) (Supp. II 1978).

79. *Id.* § 1272.

80. *Id.* § 1272(a)(6).

81. *Id.* § 1272(a)(1).

82. *Id.* § 1272(c).

teria are outlined for designating areas unsuitable,<sup>83</sup> and before an area can be designated following the filing of the petition, the regulatory authority must prepare a statement analyzing the potential coal resources of the area, the demand for coal resources, and the impact of designation on the environment, the economy and the supply of coal.<sup>84</sup>

A great deal of controversy arose as to whether the petition process of Section 522 applied to federal lands as well as state and private lands after the proposed permanent rules to implement SMCRA were published.<sup>85</sup> Much evidence was produced from the legislative history of SMCRA to suggest federal lands were excluded from operation of the Section.<sup>86</sup> However, the Office of Surface Mining Reclamation and Enforcement (established by the Act to implement SMCRA) rejected these contentions and issued Part 769 of the rules to cover the petition process relative to federal lands.<sup>87</sup> DOI has been developing unsuitability criteria for federal lands since November 1977. These specific unsuitability criteria are discussed more fully in Parts III and IV of this article, particularly as they relate to the new FCMP.<sup>88</sup>

Other SMCRA provisions relevant to the new FCMP include:

- (1) Authority to exchange federal lands already under lease but which have been included in an alluvial valley floor and are subject to the grandfather clause in Section 510(b)(5) of SMCRA;<sup>89</sup> and
- (2) A requirement for the consent of private surface owners before Interior can lease federal coal under land on which the surface is privately owned.<sup>90</sup>

d. *Department of Energy Organization Act.* Congress created the U.S. Department of Energy (DOE) in 1977.<sup>91</sup> While this legislation did not change the primary responsibility of the Secretary of Interior over federal mineral leasing, including coal leasing, or other land use planning and environmental requirements, the Act did transfer certain authorities to the Secretary of Energy. Specifically, the new DOE has responsibilities for federal mineral leases to:

- (1) Set production rates;
- (2) Foster competition among coal and other federal mineral producers;
- (3) Implement alternative bidding systems;

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83. *Id.* § 1272(a)(3). These criteria include:

- (1) mining would be incompatible with land use programs;
- (2) mining would adversely affect historically and archeologically sensitive areas;
- (3) mining would substantially endanger life and property or result in a substantial loss in water supply or in production of food and fiber.

84. *Id.* § 1272(d).

85. *See* preamble to final permanent program regulations implementing SMCRA, 44 Fed. Reg. 15007 (1979).

86. *Id.*

87. *Id.* at 15347, codified at 30 C.F.R. § 769 (1979).

88. *See* notes 183-84 and 265-83 and accompanying text, *infra*.

89. 30 U.S.C. § 1260(b)(5) (Supp. II 1978).

90. *Id.* § 1304(c) Indian lands are explicitly excepted from this section. *Id.* 1304(f) (1979).

91. 42 U.S.C. §§ 7101-7352 (Supp. II 1978).

- (4) Establish diligence requirements for operations on federal lands; and
- (5) Specify the procedures, terms, and conditions for the acquisition and disposition of federal royalty-in-kind.<sup>92</sup>

All authorities not specifically transferred under Section 302 of the Act were retained by the Secretary of Interior. Thus, Interior continues to be solely responsible for the *issuance and supervision* of federal mineral leases and the enforcement of all regulations applicable to the leasing of mineral resources—including, but not limited to, lease terms and conditions and production rates.<sup>93</sup>

To facilitate coordination between the two departments, the Act establishes a Leasing Liaison Committee.<sup>94</sup> The Committee is composed of an equal number of representatives from each department. A charter for the Committee was signed in May 1978 by the Secretaries of Interior and Energy, which assigned the Committee responsibility to:

- (1) Identify and solve problems between the departments relating to federal energy leasing;
- (2) Provide timely information exchange;
- (3) Expedite consideration and resolution of interdepartmental matters generally;
- (4) Insure cooperation and assistance in preparing annual reports and reports to the Congress; and
- (5) Facilitate consultation relative to technical matters of concern to both departments.<sup>95</sup>

According to its charter, the Committee is not a policy-making body; however, it may address policy issues and make recommendations to the respective Secretaries.<sup>96</sup>

While the statutes listed above have the most direct impact on the development of federal coal resources, a significant number of other federal statutes have at least indirect impacts on such development. These federal laws are summarized here in tabular form for easy reference with a summary description of their major relevance with regard to federal coal management and production.<sup>97</sup>

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92. *Id.* § 7152.

93. *Id.* § 7153. The two departments are required by the Act to coordinate their activities, especially the following:

- (1) Energy must consult with Interior on the preparation of regulations and give it 30 days to comment on proposed regulations, and
- (2) Interior must give Energy 30 days to approve lease terms and conditions relating to transferred responsibilities—no term or condition can be included in a lease if Energy disapproves.

42 U.S.C. § 7153(b), (c)(1) (Supp. II 1978).

94. *Id.* § 7140.

95. U.S. GENERAL ACCOUNTING OFFICE, NO. EMD-79-60 FEDERAL LEASING POLICY—IS THE SPLIT RESPONSIBILITY WORKING? 2, (1979) [hereinafter cited as GAO FEDERAL LEASING REPORT].

96. *Id.* For an expanded discussion of the split responsibilities between the departments specifically in relation to federal coal leasing, see text at notes 252-64 and accompanying text *infra*.

97. FEDERAL COAL EIS, *supra* note 22, at 1-17 through 1-23.

Table I FEDERAL LAWS AFFECTING COAL DEVELOPMENT AND ENERGY CONVERSION

Popular Name	Public Law/U.S. Code Citation	Purpose	Major Relevance
Antiquities Act of 1906	59-209; 16 U.S.C. 431	<ul style="list-style-type: none"> <li>•Regulates antiquities excavation and collection (including fossil remains).</li> <li>•Protects historical values on public land.</li> </ul>	<ul style="list-style-type: none"> <li>•Mitigates potential harm to historical, archaeological, and paleontological resources.</li> </ul>
Archaeological and Historical Preservation Act of 1974; Archaeological Salvage Act	93-291, 86-523; 16 U.S.C. 469	<ul style="list-style-type: none"> <li>•Provides for recovery of data from areas to be affected by Federal actions.</li> <li>•Provides for preservation of data (including relics and specimens) at every Federal construction project.</li> <li>•Protects bald eagle and eagle habitat.</li> </ul>	<ul style="list-style-type: none"> <li>•Mitigates potential harm to historical and archaeological, and paleontological resources.</li> <li>•Mitigates potential harm to historical and archaeological resources.</li> <li>•May make certain coal lands unsuitable for development.</li> </ul>
Bald Eagle Protection Act of 1969	86-70; 16 U.S.C. 668	<ul style="list-style-type: none"> <li>•Establishes requirements for areas failing to attain National Ambient Area Quality Standards (NAAQS).</li> </ul>	<ul style="list-style-type: none"> <li>•Limits industrial development within and adjacent to areas exceeding NAAQS and areas preserving clean air quality.</li> </ul>
Clean Air Act Amendments of 1977	95-95; 42 U.S.C. 7401	<ul style="list-style-type: none"> <li>•Provides for prevention of significant deterioration of areas where air is cleaner than NAAQS.</li> <li>•Modifies 1970 air act provisions regarding Federal facilities; enforcement strategies; coal utilization impacts; and interstate air pollution.</li> </ul>	<ul style="list-style-type: none"> <li>•Reduces commercial attractiveness of low-sulfur Western coal as new source standard changed to percent emissions reduction.</li> </ul>
Clean Water Act of 1977	95-217; 33 U.S.C. 1251	<ul style="list-style-type: none"> <li>•Establishes effluent limitations for new and existing industrial discharges into U.S. waters.</li> </ul>	<ul style="list-style-type: none"> <li>•May reduce development options in areas where anti-degradation policy restricts discharges into high quality waters.</li> </ul>

Popular Name	Public Law/U.S. Code Citation	Purpose	Major Relevance
Endangered Species Act of 1973	93-205; 16 U.S.C. 1531	<ul style="list-style-type: none"> <li>• Limitations set for public treatment discharges; with pretreatment by industrial users.</li> <li>• Provides mechanism to restore and maintain integrity of the nation's waters.</li> <li>• Protects endangered and threatened species and critical habitat from Federal activities. Requires prior consultation with Fish and Wildlife Service.</li> </ul>	<ul style="list-style-type: none"> <li>• Treatment facilities in areas with rapidly expanding infrastructures must meet water quality standards.</li> <li>• Effluent standards apply to coal mining point sources.</li> <li>• May make certain coal lands unsuitable for development.</li> </ul>
Fish and Wildlife Coordination Act of 1934	85-624; 16 U.S.C. 661	<ul style="list-style-type: none"> <li>• Requires consultation about water resource development actions which might affect fish or associated wildlife resource.</li> </ul>	<ul style="list-style-type: none"> <li>• Mitigates potential Federal coal development impacts.</li> </ul>
Historic Preservation Act of 1977	89-665; 16 U.S.C. 470	<ul style="list-style-type: none"> <li>• Establishes system of classifying properties on or eligible for inclusion on Historic Register.</li> <li>• Mandates Federal agency consultation with Advisory Council and State historic preservation officers.</li> </ul>	<ul style="list-style-type: none"> <li>• Mitigates potential harm to historical and archaeological values.</li> </ul>
National Environmental Policy Act of 1969	91-190; 42 U.S.C. 4321	<ul style="list-style-type: none"> <li>• Makes environmental protection part of the mandate of every Federal agency.</li> <li>• Requires impact statements for major Federal actions with potentially significant impacts.</li> </ul>	<ul style="list-style-type: none"> <li>• Provides legislative authority to control energy development on environmental grounds.</li> <li>• Impact statement process must be integral part of coal leasing system.</li> </ul>
Mining and Minerals Policy Act of 1970	91-631; 43 U.S.C. 21	<ul style="list-style-type: none"> <li>• Declares Congressional Minerals Policy.</li> </ul>	<ul style="list-style-type: none"> <li>• Provides broad, general principles for mineral resource development.</li> </ul>
Noise Control Act of 1972	92-574; 42 U.S.C. 4901	<ul style="list-style-type: none"> <li>• Requires publication of information on limits of noise required to protect public health and welfare.</li> </ul>	<ul style="list-style-type: none"> <li>• Regulations may be proposed to control coal mining areas and activities.</li> </ul>



Popular Name	Public Law/U.S. Code Citation	Purpose	Major Relevance
Resource Conservation and Recovery Act of 1976	94-580; 42 U.S.C. 6901	<ul style="list-style-type: none"> <li>•Preempts local control of railroad equipment and yard noise emissions.</li> <li>•Establishes guidelines for collection, transport, separation, recovery and disposal of solid waste.</li> <li>•Creates major Federal hazardous waste regulatory program.</li> </ul>	<ul style="list-style-type: none"> <li>•Mining locations may be affected by EPA regulations governing disposal of coal mining wastes.</li> <li>•Coal industry faced with stringent permit requirements if coal wastes classified by EPA as hazardous.</li> </ul>
Safe Drinking Water Act of 1977	95-190; 42 U.S.C. 300	<ul style="list-style-type: none"> <li>•Provides assistance to establish state or regional solid waste plans.</li> <li>•Establishes mechanism for National Primary Drinking Water Standards.</li> </ul>	<ul style="list-style-type: none"> <li>•EPA conducting study of the impacts of pits, ponds, lagoons, etc., on underground water supplies for public water systems.</li> <li>•Provides opportunity for expanded data base.</li> </ul>
Soil and Water Resources Conservation Act of 1977	95-192; 16 U.S.C. 2001	<ul style="list-style-type: none"> <li>•Requires appraisal by Secretary of Agriculture of information and expertise on conservation and use of soils, plants, woodlands, etc.</li> </ul>	
Multiple-Use Sustained Yield Act of 1960	86-519; 16 U.S.C. 528	<ul style="list-style-type: none"> <li>•Requires management of national forests under principles of multiple use so as to produce a sustained yield of products and services.</li> </ul>	<ul style="list-style-type: none"> <li>•Mandates land management practices similar to those required under the Department's coal management program.</li> </ul>
National Forests Management Act of 1976	95-233; 16 U.S.C. 472a	<ul style="list-style-type: none"> <li>•Establishes guidelines for the Secretary of Agriculture for the sale of forest products from the national forest system.</li> </ul>	<ul style="list-style-type: none"> <li>•Principles should be considered in BLM's land use planning process.</li> </ul>

## 2. Regulations

A veritable deluge of regulations has been promulgated under each of the federal statutes listed above. This part of the article on the history of the federal coal leasing system, however, will make no attempt to inventory all these regulations. Reference should be made to applicable parts of the *Code of Federal Regulations* for applicable rules.<sup>98</sup> This section of the article will, however, provide a brief description of federal regulations issued to implement the FCLAA discussed above.<sup>99</sup>

Shortly after passage of the FCLAA, Interior issued regulatory changes to its EMARS leasing system to make this system compatible with the new law.<sup>100</sup> Regulations were also issued for diligent lease development and competitive coal leasing procedures as well as rules governing the issuance of licenses for coal exploration on public lands. For purposes of easy reference, and to provide a foundation upon which to compare and contrast the new FCMP, the regulations which were issued pursuant to the FCLAA in 1976 and 1977 have been summarized below.<sup>101</sup>

Table II

Section of PL 94-377	Date of Rulemaking	Title 43 CFR Part	Summary of Regulation
5	12/29/76	3500.0-5	Defined logical mining unit (LMU) diligent development and continued operation.
2	1/25/77	3500.0-5 3502.9	Defined public bodies and government entities. Established public bodies/government entities qualification criteria.
11	1/25/77	3501.1-4	Established 46,080-acre lease and permit holding limitation for one State and 100,000-acre lease and permit holding limitation nationwide.
16	1/25/77	3501.1-5 3501.2-1	Excludes coal leasing on National Parks System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National System of Trails and Wild and Scenic River Systems.
14	1/25/77	3503.3-1	Allows rental payments to be credited against royalties on leases issued prior to the Act. Excludes such credits on leases issued subsequent to the Act.
6	12/29/76	3503.3-2	Clarified payment of advanced royalty and distinguished advance royalty payments on leases issued prior to and subsequent to the date of the Act.

98. See, e.g., regulations implementing SMCRA at 30 C.F.R. §§ 700-890 (1979); coal mining operating rules enforced by the U.S.G.S., 30 C.F.R. § 211 (1979); public land resource planning rules of the BLM, 43 C.F.R. § 1600 (1979).

99. See notes 63-66 and accompanying text *supra*.

100. On July 19, 1979, Interior issued new rules implementing the 1920 Act, as amended. Although the rules have been renumbered, they do not differ materially from their predecessors summarized in Table II. 44 Fed. Reg. 42584 (1979).

101. Rules issued after enactment of the FCLAA and summarized in Table II were codified in 43 C.F.R. § 3500 (1979).

Section of PL 94-377	Date of Rulemaking	Title 43 CFR Part	Summary of Regulation
5	1/25/77	3505.1-1 3505.2 3505.2-1 to 3505.2-4 3511.2- (b)(1) 3511.4-4 3521.2-2	Eliminated all references to coal prospecting permits.
4	1/25/77	3507(all) 9230	Coal exploration licenses.
6	12/29/76	3520.2-1	Duration of leases issued or readjusted after the date of Act shall be 20 years and as long thereafter as the lessee produces commercial quantities annually.
5	12/29/76	3520.2-5	Diligent development and advanced royalties.
5	12/29/76	3520.2-6	Establish logical mining units and logical mining unit reserves.
6	12/29/76	3522.2-1	Coal leases subject to readjustment at end of 20 years and every 10 years thereafter.
6	12/29/76	3523.2-1	Coal leases shall be terminated or subject to cancellation upon failure to comply with diligent development.
13	1/25/77	2524.1-1	Revoked old and established new lease modification limitation.
		3525	Conformed the Energy Minerals Activity Recommendation System — the Department's coal leasing system to the Act.
2	1/25/77	3525.1	Included the Act in Authorities section and established competitive sales as only method for disposing of coal leases.
2	1/25/77	3525.3	State government participation and surface management agency consent.
3	1/25/77	3525.4	Included production within 10 years after lease issuance as a prerequisite to acquiring new leases.
12	1/25/77	3525.5	Included authority to lease land withdrawn from military or naval purposes subject to consent of Secretary of the Department of Defense.
2	1/25/77	3525.6	Leasing to public bodies.
2	1/25/77	3525.7	Deferred bonus payment provision.

### 3. Lawsuits

a. *Kleppe v. Sierra Club*. The Supreme Court provided the first extensive treatment of the environmental impact statement requirements of NEPA<sup>102</sup> as they relate to federal coal activities in 1976 with its decision in *Kleppe v. Sierra Club*.<sup>103</sup> The litigation, which took over three years to reach the Supreme Court, centered on the Sierra Club's contention that coal development in the Northern Great Plains area<sup>104</sup> could not be approved by federal agencies without preparation of a comprehensive environmental impact statement (EIS) for the entire region.

The United States Court of Appeals for the District of Columbia Circuit found that although there was no federal regional plan or program for coal development in the Northern Great Plains area, federal agencies had contemplated such a regional plan and thus an EIS on a regional basis was required.<sup>105</sup> The Court of Appeals enjoined Interior from approving four mining plans in the eastern Powder River Coal Basin covering a two-county area in Wyoming.<sup>106</sup> The court also proposed a four-part balancing test to determine when a regional EIS must be prepared during the contemplation of a plan or action. The aspects of the test included:

- (1) The likelihood that the program would soon be initiated;
- (2) The extent to which information would be available on the effects of program implementation;
- (3) The extent to which irreversible commitments of resources were being made or options were being precluded; and
- (4) The severity of the resultant environmental impacts.<sup>107</sup>

The Supreme Court reversed the Court of Appeals decision and held that NEPA did not require a regional EIS for the Northern Great Plains area.<sup>108</sup> The Court found that an EIS may be required at the time a federal agency makes a recommendation or report on a proposal for federal action. Nevertheless, mere contemplation of action would not trigger the requirements for preparation of an EIS, and the Court of Appeals balancing test was thus eliminated.<sup>109</sup>

Although a region-wide EIS was not required by the Court, Interior, following rather strong intimations by the Supreme Court, has determined that statements will be prepared for regions where several related projects are pending at the same time.<sup>110</sup> Further, it is clear that an EIS will have to

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102. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976).

103. 427 U.S. 390 (1976).

104. *Id.* at 396. The Northern Great Plains region encompasses portions of four states—northeastern Wyoming, eastern Montana, western North Dakota, and western South Dakota.

105. *Sierra Club v. Morton*, 514 F.2d 856, 883 (D.C. Cir. 1975), *rev'd sub nom. Kleppe v. Sierra Club*, 427 U.S. 390 (1976). The defendant agencies were ordered by the Circuit Court to inform the lower court of their role in the further development of the region; if they decided to control that development, an environmental impact statement would be required.

106. 514 F.2d at 859-60.

107. *Id.* at 880.

108. *Kleppe v. Sierra Club*, 427 U.S. 390, 394 (1976).

109. *Id.* at 404.

110. *Id.* at 411.

be prepared on a site-specific basis prior to the approval by Interior of any particular coal mining plan.<sup>111</sup>

b. *NRDC v. Hughes*. The primary impetus for development of a new federal coal program was the decision issued by Federal District Judge Pratt on September 27, 1977, in *NRDC v. Hughes*.<sup>112</sup> The Natural Resources Defense Council (NRDC) challenged the validity of the final EIS for the proposed federal coal leasing program (the EMARS system) in U.S. District Court for the District of Columbia on October 21, 1975. The final EIS was challenged principally for its failure to discuss the need for additional federal coal leasing.<sup>113</sup> At the time the lawsuit was filed federal coal production comprised only three percent of all coal mined in the United States. The plaintiffs in the case cited DOI coal reserves statistics which indicated that approximately 26 billion tons of potentially recoverable federal coal were presently under lease in 1975. At an estimated federal coal production rate projected from 1985 of 320 million tons per year, plaintiffs alleged that outstanding federal coal leases would provide coal for the next 121 years.<sup>114</sup>

The Court addressed two principal issues: first, whether a new program for federal coal leasing should be undertaken at all; and, second, if such a program were necessary, the type of leasing system that should be initiated.<sup>115</sup> In concluding that the "no action" alternative had not been adequately discussed in the final EIS, the Court ordered Interior to prepare a supplemental draft EIS stating:

The cursory treatment of the "no action" alternative provided in the final EIS does not satisfy the mandate of Section 102(C) of NEPA. . . . The Department did not take a "hard look" at this policy option during its decision-making process. . . . To conclude, the environmental consequences of any national coal leasing program cannot be gainsaid and require no elaboration. The pro-

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111. *Id.* at 414. Justice Marshall tempered even this site-specific environmental statement requirement when he stated:

Nor is it necessary that petitioners always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects. As petitioners have emphasized, and respondents have not disputed, approval of one lease or mining plan does not commit the Secretary to approval of any others; nor, apparently, do single approvals by the other petitioners commit them to subsequent approvals. Thus, an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals.

*Id.* at 414 n.26.

112. 437 F. Supp. 981 (D.D.C. 1977), *amended*, 454 F. Supp. 148 (D.D.C. 1978).

113. *Id.* at 991. Judge Pratt summarized this particular allegation:

Defendants' position in support of the [EMARS] program, i.e., that because federal coal production is rapidly increasing more federal coal must be leased, is countered by the plaintiffs' response that the argument ignores the magnitude of the amount of coal currently under lease. Plaintiffs cite the BLM coal reserve statistics which reveal that approximately 26 billion tons of potentially recoverable federal coal are presently under lease. At the estimated 1985 rate of federal coal production (320 million tons per annum) plaintiffs state that these outstanding leases would provide enough coal for the next 121 years. [Footnotes and citations omitted.]

*Id.*

114. *Id.*

115. *Id.* at 990.

gram under consideration was the result of a decision apparently made long before and apart from the preparation of the draft EIS. . . .<sup>116</sup>

Judge Pratt's order of injunction reads, in relevant part:

Ordered, that federal defendants . . . , are enjoined from taking any steps whatsoever, directly or indirectly, to implement the coal leasing program, including calling for nominations of tracts for federal coal leasing and issuing any coal leases, except when the proposed lease is required to maintain an existing mining operation at the present levels of production or is necessary to provide reserves necessary to meet existing contracts and to the extent the proposed lease is not greater than is required to meet these two criteria for more than three years in the future . . . .<sup>117</sup>

A modified order was issued by Judge Pratt on June 14, 1978, authorizing substantially more leasing before the new EIS was issued.<sup>118</sup> Under the agreement, federal coal leasing could take place under the following circumstances:

- (1) *By-Pass Leases* would be permitted where federal coal would otherwise be lost if not developed by an existing mine because subsequent costs would be too high. By-pass leases could be issued for up to five years, but mining operations had to be in existence on September 27, 1977;
- (2) *Employment Leases* could be issued to maintain production and employment for mines in existence on September 27, 1977, which were running short of reserves or where additional reserves were needed to meet existing contracts. Employment leases could be issued for up to eight years of reserves;
- (3) *ERDA Project Leases* could be issued to support Energy Research and Development Administration (ERDA) Projects which were authorized under Section 908 of SMCRA. These leases could be issued for no more than 500,000 tons of coal per year and only under circumstances showing that the coal production technology under assessment could not be demonstrated on existing leases or private coal holdings;
- (4) *Lease Exchanges* were permitted pursuant to the exchange authority for alluvial valley floors under Section 510(b)(5) of SMCRA;
- (5) *Hardship Leases* were authorized for seven specific lease applications which were pending during the suit. Each of these particular leases had some special circumstance or hardship which justified lease issuance prior to completion of the new EIS;
- (6) *Non-Competitive (Preference Right) Lease Applications* could be processed *but not issued* for the twenty applications which Interior deemed to have the least environmental impact. Preference was to be given to those applications for tracts where 90% of the reserves could be mined by deep mining methods and for those applications for tracts which would not require

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116. *Id.* at 991.

117. *Id.* at 993.

118. 454 F. Supp. 148, 150.

substantial additional transportation facilities, water storage or supply systems.<sup>119</sup>

Interior estimated that as many as thirty-five leases involving 275 to 300 million tons of coal reserves were involved in the amended order. Assuming the leases were granted, the increased annual production from federal coal lands would be as much as 13 to 17 million tons. This compares with approximately 96 million tons of federal coal which were produced in 1977. The original order issued by Judge Pratt would have only permitted the issuance of six leases resulting in about 10 million tons of production.<sup>120</sup>

c. *NRDC v. Berkland*. Preference right lease applications (PRLAs) were the subject of a law suit filed in U.S. District Court for the District of Columbia and decided in 1978. *NRDC v. Berkland*<sup>121</sup> addressed the issue of whether the Secretary of Interior was under a duty to issue a non-competitive coal lease to an otherwise qualified holder of a PRLA. Plaintiffs sought a declaratory judgment that:

- (1) The Secretary of Interior has discretion under the Mineral Lease Act of 1920 and the National Environmental Policy Act (NEPA) to reject preference right lease applications on environmental grounds; and
- (2) The Secretary must prepare an environmental impact statement on any proposed issuance of a preference right coal lease where the issuance would constitute a major federal action significantly affecting the quality of the human environment.<sup>122</sup>

Defendants maintained that under the terms of the Mineral Leasing Act of 1920<sup>123</sup>, the Secretary of Interior was required to issue a preference right lease where the holder of the prospecting permit authorized by the Act finds coal in "commercial quantities."<sup>124</sup> Defendants also claimed that NEPA, while granting broad discretion to the Secretary to set federal coal lease terms, gives the Secretary no added discretion to reject a lease on

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119. *Id.* In addition to these six situations, Interior could process but not issue one specific lease sought by Edison Development Corporation.

120. FEDERAL COAL EIS, *supra* note 22, at 1-14.

121. 458 F. Supp. 925 (D.D.C. 1978).

122. *Id.* at 928.

123. 30 U.S.C. § 201(a) (Supp. II 1978).

124. A permittee is deemed to have discovered "commercial quantities" of coal where the mineral deposit discovered under the prospecting permit was of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The prospecting permittee is also required to present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the coal will exceed his costs of developing the mine, and extracting, removing, and marketing the coal. See 43 C.F.R. § 3520.1-1(c) (1979).

One significant revision has been made to the definition of "commercial quantities" in final regulations implementing the Department of Interior's new federal coal management program. In the July 19, 1979, final regulations (44 Fed. Reg. 42628-42652) Interior added the following statement to the above-stated definition of commercial quantities: "The costs of development shall include the estimated cost of exercising environmental protection measures and suitably reclaiming the lands and complying with all applicable federal and state laws and regulations." 43 C.F.R. § 3430.1-2(b) (1979). Thus, recipients of a federal coal preference right lease must now explicitly estimate the costs of complying with state and federal environmental regulations to meet the commercial quantities test.

purely environmental grounds once the requirement of commercial quantities has been met. As such, the defendants argued an EIS should be prepared on the proposed lease terms, not on the proposed issuance of the lease.<sup>125</sup>

A detailed discussion of the *NRDC v. Berklund* suit is not appropriate for this article.<sup>126</sup> For our purposes, a brief summary of the two principal decisions issued by the court will suffice. Judge Green stated that:

- (1) Provisions of the Mineral Leasing Act of 1920 do not vest the Secretary of Interior with the discretion to reject preference right coal lease applications when an applicant has made a showing that commercial quantities of coal exist within the proposed lease area; and,
- (2) If issuance of a preference right coal lease could constitute a major federal action significantly affecting the quality of the human environment, the Secretary of Interior must prepare an appropriate EIS prior to such lease issuance.<sup>127</sup>

Although an EIS may well be necessary before coal mine plan approval or the issuance of a mining permit under SMCRA, the court held that NEPA "demands, nevertheless, that a detailed and informed analysis of the environmental cost be prepared and available prior to the issuance of the lease."<sup>128</sup>

d. *Peabody Coal Company v. Cecil D. Andrus, et al.* In 1977 the DOI Solicitor determined that an application for an extension of a coal prospecting permit to the Department of Interior was not a valid existing right within the meaning of the Federal Coal Leasing Amendments Act of 1976.<sup>129</sup> Based on the opinion, BLM rejected pending applications for extensions of coal prospecting permits. These rejections were appealed to the

125. 458 F. Supp. 925, 928 (D.D.C. 1978).

126. For such a discussion, see Johns, *Federal Preference Right Coal Leases: How Much "Right" Really Exists?*, 12 NAT. RESOURCE LAW. 389 (1979). The implications of recent changes in statutory and regulatory provisions governing existing federal coal leaseholds are examined in Humphreys, *Existing Federal Coal Leaseholds—How Strong is the Hold?*, 26 ROCKY MTN. MIN. L. INST. 5-1 (1979). Mr. Humphreys poses an essential question relative to whether or not the new federal coal regulatory system, which purports to apply to existing as well as new federal coal leases, when implemented, constitutes an unlawful "taking" of private property as proscribed by the fifth amendment to the United States Constitution. Mr. Humphreys concluded, in part, that:

It seems apparent that the statutory requirements of, and certainly the regulatory requirements flowing out of, the Federal Coal Leasing Amendments of 1975 are constitutionally suspect, both on the basis of their complete frustration of investment-backed expectations of those owning existing federal coal leases and on the basis that the requirements, particularly the production requirements imposed by regulation, have the effect of (and in the case of the regulations have as their real purpose) a forced transfer of coal resources from the private sector to the United States.

Thus, in any challenge of the new requirements which the Federal government purports to apply to existing federal coal leaseholds, the lack of a sound constitutional basis for the requirements should be considered.

*Id.* at 5-12.

127. 458 F. Supp. 925, 935, 939 (D.D.C. 1978).

128. *Id.* at 939.

129. U.S. DEP'T OF INTERIOR, *Solicitor's Opin. No. M-36894, Authority to Extend Coal Prospecting Permits: Effect of Section 4 of the Federal Coal Leasing Amendments Act of 1975* (July 21, 1977).



Interior Board of Land Appeals (IBLA), which affirmed the BLM rejections.<sup>130</sup>

Peabody Coal Company appealed the IBLA opinion in the U.S. District Court for the District of Wyoming.<sup>131</sup> Peabody challenged Interior's refusal to extend the term of the prospecting permits as arbitrary and capricious and an abuse of administrative discretion. The plaintiff asked the court to reverse and set aside the IBLA decision and order Interior to grant the extension of the term of the coal prospecting permits or, in the alternative, to issue the preference right leases based on a demonstration of discovery of commercial quantities.

In holding that Peabody was entitled to a two-year extension of its prospecting permit, District Judge Kerr in Wyoming Federal Court stated,

The agency delay disclosed by the record is inexcusable. In light of that delay, the Government's position that Peabody Coal has no "valid existing rights" under the savings clause of the FCLAA becomes untenable. The Government's acts were arbitrary and capricious in failing to approve plaintiff's 1972 applications for permit extensions prior to the 1976 enactment of the FCLAA and it would be inconsistent with basic principles of fairness to allow the Government to prevail in these circumstances.

The decision of the Secretary of the Interior is in conflict with the settled administrative practice of the Interior Department and with the various Secretarial Orders that were issued at the time in question.

*Prior to 1970, the coal leasing policy followed by the Interior Department was reliable. A party would receive a two year coal prospecting permit and, if the party complied with the statutory and regulatory requirements, the permit would be extended for two years. In most cases, the permit would ripen into a preference right coal lease. In the early 1970's, without legislative action or agency hearing or rulemaking procedures, the Interior Department began an unofficial moratorium on approving coal leasing permits, extensions, or preference right leases. It was not until 1973 that the Interior Department publicly announced that such a moratorium was in effect.*

. . . .

The Interior Department relies on their discretionary authority to approve permit extensions. Such discretion is not boundless; statutes, regulations, agency procedures and agency orders all delineate the parameters of that discretion. Delay tactics have no place in that framework.<sup>132</sup>

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130. Peabody Coal Co. v. Andrus, 36 IBLA 242 (1978).

131. Peabody Coal Co. v. Andrus 477 F. Supp. 120 (D. Wyo. 1979).

132. *Id.* at 123-24. A similar decision was rendered by Judge Kerr reversing another Interior Board of Land appeals opinion in Rosebud Coal Sales Co. v. Andrus, No. C78-261k (D. Wyo., Oct. 17, 1979).

e. *Utah International, Inc. v. Andrus*. This case attempted to carry the position stated in the *NRDC v. Berklund* suit a step further.<sup>133</sup> Utah International sued for a writ of mandamus to force the issuance of a preference right coal lease from DOI. A certification that commercial quantities of coal existed as of 1977 in the proposed lease area had been made by BLM. Nevertheless, BLM refused to issue a lease. The U.S. District Court in Colorado issued a decision on January 24, 1979, that "this nine year delay and inaction on the part of the defendants is unconscionable, is unreasonable and arbitrary, and violates the requirements of due process of law."<sup>134</sup> The court refused, however, to issue a writ of mandamus to the Secretary of Interior. Rather, the court ordered the Secretary to initiate final administrative action on the lease application within 120 days of the court's decision. The court stated,

It is beyond the scope and authority of this Court at this time to order by mandamus that the defendants herein issue a specific lease; however, it is within the scope and power of this Court to direct that the defendants issue a decision which shall be a final administrative decision with respect to the plaintiff's pending application.<sup>135</sup>

Secretary Andrus, nevertheless, decided not to issue the lease to Utah International, in part as a result of the court order in the *NRDC v. Hughes* case.<sup>136</sup>

On April 25, 1979, Interior issued a decision which constituted final administrative action for the application which, in essence, states that Utah International's PRLA must be run through the new regulatory "mill" to determine the right to a lease. The Colorado District Court, as of this writing, has not yet ruled on Secretary Andrus' decision. Since Interior is no longer bound by the *NRDC v. Hughes* decision, Utah International's PRLA will be processed to completion, unless the court orders otherwise, along with all other pending PRLAs, by December 1, 1984.<sup>137</sup>

### III. THE NEW FEDERAL COAL MANAGEMENT PROGRAM

#### A. *Development of the Program*

As the previous section indicates, a variety of factors led to the ultimate decision to develop a new federal coal program. Of primary importance, of course, was the decision by Judge Pratt in *NRDC v. Hughes*.<sup>138</sup> Congress was also preoccupied with federal coal authorities and policies, however, and reformed the statutory basis for the management of federal coal by enacting

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133. See notes 112-20 and accompanying text, *supra*.

134. *Utah International, Inc. v. Andrus*, No. 77-k-595 (D. Colo. 1979).

135. *Id.*

136. *NRDC v. Hughes* enjoined the Secretary from issuing any new federal coal leases except those allowed in the amended court order. See notes 112-20 and accompanying text, *supra*.

137. Telephone interview with Don Humphreys, Senior Counsel, Utah International, Inc., April 21, 1980. See also FISCAL 1979 COAL REPORT, *supra* note 21, at 31.

138. See notes 112-20 and accompanying text, *supra*. Two other articles, both written in 1978, provide somewhat different perspectives on federal coal management. See McGee & Dahl, *Federal Coal Leasing Waltz*, 80 W. VA. L. REV. 455 (1978); Krulitz, *Management of Federal Coal Reserves*, 24 ROCKY MTN. MIN. L. INST. 139 (1978) (Mr. L. M. Krulitz was Solicitor of the Department of Interior at the time the above article was written.)

the Federal Coal Leasing Amendments Act of 1976,<sup>139</sup> the Federal Land Policy and Management Act of 1976,<sup>140</sup> the Surface Mining Control and Reclamation Act of 1977,<sup>141</sup> and the Department of Energy Organization Act of 1977.<sup>142</sup>

During this same period, President Carter outlined the administration's coal policy in two messages to Congress. His energy message of April, 1977, presented the National Energy Plan, calling for doubling of national coal production by 1985 and emphasizing the role of coal in reducing the country's dependence on imported oil and gas.<sup>143</sup>

President Carter's environmental message of May, 1977, expressed the Administration's policy to increase coal production without increasing environmental damage and extreme socio-economic impacts from such production. The President emphasized his balanced approach to the development of the Nation's coal resources by stating:

The newly enacted Coal Leasing Amendments and the Federal Land Policy and Management Act provide the Secretary of the Interior with the necessary authority to carry out environmentally sound, comprehensive planning for the public lands. His duty now is to implement an affirmative program for managing coal lands and associated resources in a manner that fully protects the public interest and respects the rights of private surface owners.<sup>144</sup>

A memorandum from the President to Secretary Andrus dated May 24, 1977, directed the Secretary to: "Manage the coal leasing program to assure that it can respond to reasonable production goals by leasing only those areas where mining is environmentally acceptable and compatible with other land uses."<sup>145</sup>

While the decision in the *NRDC v. Hughes* suit was still pending, Secretary Andrus ordered a full-scale inter-agency coal policy review to assess the need for leasing federal coal and to initiate the development of a new management program. A review committee comprised of the Solicitor and the Assistant Secretaries of Interior was formed and the Office of Coal Leasing, Planning and Coordination (OCLPC) was established at the departmental level to coordinate the federal coal review.<sup>146</sup>

This section of the article will briefly outline the principal federal agency responsibilities for development of the new coal program, the

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139. 30 U.S.C. §§ 201-214 (Supp. II 1978). See notes 63-66 and accompanying text, *supra*.

140. 43 U.S.C. §§ 1701-1782 (Supp. II 1978). See notes 67-72 and accompanying text, *supra*.

141. 30 U.S.C. §§ 1201-1308 (Supp. II 1978). See notes 73-90 and accompanying text, *supra*.

142. 42 U.S.C. §§ 7101-7352 (Supp. II 1978). See notes 91-96 and accompanying text, *supra*.

143. *The Energy Problem: The President's Address to the Nation*, 13 WEEKLY COMP. OF PRES. DOC. 560, 564 (Apr. 18, 1977). See also *National Energy Program: Fact Sheet on the President's Program*, 13 WEEKLY COMP. OF PRES. DOC. 573, 580 (Apr. 27, 1977).

144. *The Environment: The President's Message to the Congress*, 13 WEEKLY COMP. OF PRES. DOC. 782, 787 (May 23, 1977).

145. SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 4. The President further directed that the Department of Interior, "scrutinize existing Federal coal leases (and applications for preference right leases) to determine whether they show prospects for timely development in an environmentally acceptable manner, taking steps as necessary to deal with non-producing and environmentally unsatisfactory leases and applications." *Id.*

146. *Id.* at 5.

programmatic environmental impact statement, and the series of events which led to issuance of the final EIS and the regulations implementing the new federal coal program.

### 1. Principal Federal Agency Involvement

Federal coal management functions and responsibilities are shared by several bureaus and offices in Interior. Secretary Andrus delegated oversight responsibility to the Under Secretary for all phases of the department's coal-related activities. This responsibility covered federal coal policy as it existed before the new program as well as development of the new coal policy mandated by President Carter. The following offices are specifically involved on a continuing basis for development of the new program: the Office of Coal Leasing, Planning and Coordination; the Bureau of Land Management; the U.S. Geological Survey; the Office of Surface Mining Reclamation and Enforcement; and the Fish and Wildlife Service.

*The Office of Coal Leasing, Planning and Coordination (OCLPC)* served as the focal point for conducting the department's coal policy review and development of a federal coal management program as mandated by the President in his National Energy Plan and Environmental Message.<sup>147</sup> OCLPC is now the key point of contact with DOI's coal management program for state and local governments, industry, environmental groups, and other Federal agencies.

*The Bureau of Land Management (BLM)* has the responsibility for inventory, land-use planning, and multiple-use management of the public lands. BLM's Office of Coal Management (OCM) is responsible for overseeing the development and implementation of BLM's coal management program, including the programmatic and regional environmental statements, the short-term leasing program established under the *NRDC v. Hughes* amended order, policy development in conjunction with the OCLPC, and the lead responsibility for the automated coal lease data system.<sup>148</sup> Operationally, the coal management program is carried out through the individual BLM State Offices and their respective District and Area Offices.

*The U.S. Geological Survey (GS)* is responsible for establishing coal resource estimates, both quantity and quality, and for preparing coal resource economic value reports for lands proposed for leasing. It provides technical background information necessary for BLM's land-use planning activities. GS establishes known recoverable coal resource areas (KRCRA's). KRCRA's are areas in which sufficient coal resource data have been obtained to determine that the federal coal within those areas is recoverable.<sup>149</sup>

The GS has several other important coal management functions. As a result of determining coal resource economic values, GS recommends to

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147. See notes 143-45 and accompanying text, *supra*.

148. See notes 240-51 and accompanying text, *infra*, regarding the new automated coal lease data system and other data generating problems which the program is facing.

149. "Known Recoverable Coal Resource Area" is defined by regulation as an area, including federal lands, which meets minimum standards for recoverable coal deposits in accordance with accepted mining practices, as determined by the Director, Geological Survey. The Federal lands in a KRCRA are classified for coal leasing. 43 C.F.R. § 3400.0-5(x) (1979).

BLM lease bond amounts, royalty type, and the amount of royalty or rent. GS approves the formation of logical mining units and exploration plans. It reviews exploration license applications and mine plans on federal coal leases for conformance with the mineral leasing laws regarding conservation of resources, diligent development, and continuous operations. Finally, GS monitors production from leases to assure compliance of the lessee with diligent development and continuous production requirements.<sup>150</sup>

*The Office of Surface Mining Reclamation and Enforcement (OSM)* is responsible for establishing and enforcing minimum national standards to protect the public and the environment from the potential adverse effects of surface coal mining and for administering the national abandoned mine land reclamation program, as provided by SMCRA, to correct the degradation of the environment and the hazards that were caused by past mining practices.

OSM shares with GS the responsibility for recommending approval of mine plans and mine plan modifications. It conducts inspection and enforcement actions and is responsible for taking necessary action in the event of an environmental or public safety emergency at a coal mine site. OSM conducts inspections prior to abandonment, approves abandonment procedures, and manages the petition process designating lands unsuitable for coal mining.<sup>151</sup> OSM encourages and assists states in carrying out the control and reclamation program as provided by SMCRA.

*The Fish and Wildlife Service (FWS)* conducts research to further wildlife conservation through all stages of coal production and consumption. FWS collects basic information on fish and wildlife for use in BLM's land-use planning and coal activity planning and in OSM's mining regulation activities. It monitors coal-related activities relative to impacts on wildlife and transmits information to state and coal industry decision-makers.<sup>152</sup>

Other Department of Interior Bureaus and Offices with important tasks to perform in coal management are:<sup>153</sup>

<u>Bureau or Office</u>	<u>Principal Coal Function</u>
Heritage Conservation and Recreation Service	Preservation of historical and cultural landmarks
Bureau of Mines	Coal mining safety research and development and coal mining technology
Bureau of Reclamation	Water availability for coal-related projects
Office of Policy Analysis	Coal policy development
Office of Environmental Projects	Environmental analysis reviews
Bureau of Indian Affairs	Support for Indian management of coal

150. These GS responsibilities, in essence, designate GS as the technical supervisor of specific coal mining operations on federal lands.

151. See notes 265-83 and accompanying text, *infra*, regarding unsuitability criteria.

152. As such, the FWS retains very little "on-the-ground" implementation authority. Rather, the FWS serves as an in-house consultant, of sorts, to other agencies with direct supervisory authority as GS, OSM, and the Forest Service.

153. See FEDERAL COAL EIS, *supra* note 22, at 1-18 through 1-37, for a detailed discussion of other agency involvement.

Under the Federal Coal Leasing Amendments Act of 1976, the Department of Agriculture, Forest Service, has responsibility relating to coal management. Under the Act, the Secretary of Agriculture has consent authority for federal leases on National Forest lands. The Secretary may add terms and conditions to coal leases on these lands to protect resource and environmental values. The Secretary of Agriculture, through the Forest Service, may concur in the approval of mine and reclamation plans for leases on Forest Service lands.<sup>154</sup>

Coal-related responsibilities have also been assigned to the Department of Agriculture's Soil Conservation Service. These responsibilities include assisting in the identification of prime farmlands within areas that may be surface mined in the future and reviewing and commenting on permits for surface mining which involve prime farmland. The Service also administers the abandoned mine reclamation program for rural lands.<sup>155</sup>

Through the Department of Energy Organization Act, the Department of Energy (DOE) has been delegated several areas of coal responsibility which were formerly DOI's responsibility. Included is the authority to promulgate regulations for:

- Fostering competition for federal leases;
- Implementing alternative bidding systems for awarding federal leases;
- Establishing diligence requirements for coal development operations on federal leases;
- Setting rates of production for federal leases; and
- Specifying procedures, terms and conditions for the acquisition and disposition of federal royalty interests taken in kind.<sup>156</sup>

Due to the overlapping functions of several bureaus and offices within Interior, as well as duplicative responsibilities between Interior and DOE, several actions occurred over the past two years to coordinate these varying responsibilities. A memorandum of understanding (MOU) among three agencies (BLM, GS, and OSM) was signed after promulgation of the new coal program in June 1979.<sup>157</sup> In addition, wildlife conservation responsibilities have been outlined in an MOU between BLM and FWS which became effective on September 26, 1978.<sup>158</sup>

Further, Interior signed an MOU with the Department of Energy on August 31, 1978, for the establishment and use of production goals for Federal energy leasing. These national production goals will be used to guide Interior's setting and revision of leasing programs and lease planning schedules for all federal energy resources, including coal. The process and timeta-

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154. 30 U.S.C. § 201(a)(2)(A),(3)(A)(i) (1976).

155. 30 U.S.C. § 1236 (Supp. II 1978).

156. 42 U.S.C. § 7152 (Supp. II 1978).

157. FISCAL 1979 COAL REPORT, *supra* note 21, at 21. The MOU was signed on October 24, 1979.

158. FISCAL 1978 COAL REPORT, *supra* note 23, at 18.

ble for developing these production goals will be repeated biennially.<sup>159</sup> Finally, Interior and DOE have formally executed the charter for the Leasing Liaison Committee. The Committee will serve as an executive level coordinating mechanism on energy leasing matters between the departments.<sup>160</sup>

## 2. Issue Analysis and Preparation of Programmatic Environmental Impact Statement

The passage of coal-related legislation, Interior's review of the previous coal leasing system, and President Carter's energy and environmental policy statements led DOI to prepare a new programmatic environmental impact statement (programmatic EIS) rather than a supplemental statement for the EMARS program, which had been ordered by Judge Pratt in *NRDC v. Hughes*. Preliminary drafts of the programmatic EIS were circulated internally within the Department in the Fall of 1978.<sup>161</sup> Concurrent with the preliminary draft EIS, sixteen "issue-option papers" were presented to Secre-

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159. *Id.* at 19. See notes 228-51 and accompanying text, *infra*, for discussion of coal production goals.

160. GAO FEDERAL LEASING REPORT, *supra* note 95, at 2. See also text accompanying notes 252-64, *infra*.

A variety of other memoranda of understanding have either recently been executed or are in the process of negotiation. The MOU between BLM and the Forest Service, for example, will establish a system for coordination between these two agencies on the Federal coal management program. The MOU will authorize the Secretary of Agriculture to assess federal lands within the National Forest System and determine areas acceptable for further consideration for coal leasing. This delegation will promote the use of surface management agency land-use planning systems to insure consistent federal resource inventories and evaluation; to avoid duplication of each agency's efforts and to increase efficiency; and to assure the systematic application of the unsuitability criteria in agency planning.

Memoranda of understanding will also be developed for each of the regional coal teams. The MOU among BLM and the governors of the states of Colorado and Wyoming, for example, will serve as a model for other states now negotiating MOUs with BLM. These agreements formally specify the cooperative responsibilities of the states and the BLM for the federal coal management program within the forum of the regional coal team. The MOU will also commit the states and the BLM to cooperate in the specified manner to conduct the competitive leasing of federal coal lands.

A draft Programmatic Memorandum of Agreement (PMOA) has been developed by an inter-agency task force chaired by BLM. Through the stipulations outlined in the draft PMOA, BLM, OSM, and GS will insure that historic and cultural properties will be given adequate consideration in federal coal management program decisions, thus fulfilling the requirements of Section 106 of the National Historic Preservation Act. The cultural resource protection actions detailed in the PMOA include, but are not limited to, the preparation of coal leasing EIS's, issuance of new leases, and review and recommendations to the Secretary of Interior regarding coal mining and exploration plans for either new or existing leases.

Negotiations are continuing on the following MOUs:

- (1) Interior and the Small Business Administration on a small business set-aside program;
- (2) BLM and GS on coal land exchanges;
- (3) FWS and OSM on coal research and operations programs;
- (4) FS and OSM on inter-agency cooperation in administering and enforcing SMCRA;
- (5) OSM, GS, and the Bureau of Indian Affairs on administering SMCRA on Indian lands; and
- (6) Interior and the Department of Justice on consultation procedures.

See FISCAL 1979 COAL REPORT, *supra* note 21, at 21, 22.

161. FISCAL 1978 COAL REPORT, *supra* note 23, at 20.

tary Andrus. The papers were designed to outline the principal issues regarding the new coal program.<sup>162</sup>

The draft programmatic EIS was released to the public in December, 1978,<sup>163</sup> followed by publication of the final programmatic EIS in May, 1979.<sup>164</sup> Included in the draft programmatic EIS were "example regulations" prepared to give preliminary notice to the public of the essential elements of the preferred new coal program and to seek public comment for proposed programmatic rules.<sup>165</sup> Proposed regulations, modified from the example regulations after public comment, were published in the Federal Register with the hope that final regulations would be published sometime in June, 1979.<sup>166</sup>

Another aspect of Interior's program development activities included the preparation of regional EIS's and studies. The amended court order issued June 14, 1978, in *NRDC v. Hughes* authorized Interior to continue work on eight regional EIS's and two studies that were already underway on the date of the order.<sup>167</sup> The regional EIS's and studies are designed to analyze

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162. The following Issue/Option Papers were presented to Secretary of Interior Andrus in the preliminary phases of developing the coal program:

<u>Subject</u>	<u>Paper Date</u>	<u>Decision Date</u>
Departmental Approach to the Long-term Coal Leasing Program	9/20/77	10/26/77
Need for Leasing/Leasing-Systems Choice	6/23/78	6/30/78
Bidding Systems	6/23/78	6/30/78
Setting of Environmental Conditions and Lease Terms	6/23/78	6/30/78
State and Local Government Participation	6/23/78	6/30/78
Public Participation	6/23/78	6/30/78
Maximum Economic Recovery	6/23/78	6/30/78
Coal Leasing-Surface Owner Consent	6/23/78	6/30/78
Leasing for Limited End Uses	6/23/78	6/30/78
Public Body Leasing	6/23/78	6/30/78
Management of Preference Right Lease Applications	6/23/78	6/30/78
Management of Existing Leases	6/23/78	6/30/78
Intraregional Matters Affecting Design of a Leasing Process	7/18/78	7/28/78
Environmental Analysis Strategy	8/31/78	9/15/78
Split Estate Leasing Implementation	8/31/78	9/15/78
Land Unsuitability Criteria	9/22/78	_____

See SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 1-188.

163. U.S. DEP'T OF INTERIOR, DRAFT ENVIRONMENTAL STATEMENT—FEDERAL COAL MANAGEMENT PROGRAM (1978) [hereinafter cited as DRAFT COAL EIS].

164. FEDERAL COAL EIS, *supra* note 22.

165. DRAFT COAL EIS, *supra* note 163, at A-1 through A-39.

166. 43 Fed. Reg. 16,800-16,845 (1979).

167. 454 F. Supp. 148, 150 (D.D.C. 1978).

The following EIS's and studies were prepared while under the amended Court order:

- (1) Southwest Wyoming, final EIS completed 9-1-78;
- (2) Northwest Colorado study, final study completed 12-4-78;



the socio-economic and environmental impacts of increased federal coal mining in specific geographic areas. As well, site-specific actions such as mine plans and production facilities are included in the regional EIS's and studies.<sup>168</sup> Interior plans to use data from the regional EIS's and studies in the series of new regional lease sale EIS's that will be required if the preferred program outlined in the final programmatic EIS is adopted. Although boundaries of the existing regions do not coincide with the newly established coal production regions, much of the data from the ongoing regional EIS's will be used in the new statements.<sup>169</sup>

### B. *The New Federal Coal Regulatory Program*

Final regulations for the FCMP were published on July 19, 1979, following issuance of the final programmatic EIS and publication of the SECRETARIAL ISSUE DOCUMENT on the FCMP published in June, 1979.<sup>170</sup> No attempt will be made to examine the final rules in every detail for purposes of this article. Rather, some of the key distinctions between the new program and earlier regulations issued to implement the now historic Energy Minerals Activities Recommendation System-EMARS I and II will be discussed. This section provides the background for the discussion of the problems and activities of the Green River-Hams Fork regional coal team in preparation of the first scheduled federal coal lease sale in January, 1981.<sup>171</sup>

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- (3) West Central North Dakota study, completed 2-21-79;
  - (4) Star Lake-Bisti (New Mexico), final EIS completed 3-1-79;
  - (5) South Central Wyoming, final EIS completed 3-20-79;
  - (6) Eastern Powder River Wyoming (supplement), final EIS supplement completed 4-3-79;
  - (7) West Central Colorado, final EIS completed 4-30-79;
  - (8) Southern Utah, final EIS completed 5-23-79;
  - (9) Central Utah, final EIS completed 7-2-79; and
  - (10) Northern Powder River Montana, draft EIS completed 7-13-79.

See FISCAL 1979 COAL REPORT, *supra* note 21, at 33.

168. With the completion of these EIS's and studies, the Department of Interior has been able to take action on several of the proposals analyzed in the EIS's and studies. For example, on August 3, 1979, Secretary Andrus approved the issuance of a right-of-way across BLM lands in relation to an application filed by Star Lake Railroad. The application includes plans for a 114-mile rail line to transport an estimated 16.5 million tons of coal annually by 1990 from northwest New Mexico to the main line of the Santa Fe Railroad. Several additional coal mining plans are in various stages of review by the Department of Interior. The Black Butte Mine, for example, which is analyzed as part of the Southwestern Wyoming EIS, received mine plan approval from Secretary Andrus on December 7, 1978. The plan covers approximately 36,600 surface acres (12,930 federal, 160 state, and 23,510 private) and would result in approximately 6.3 million tons of production per year.

For a list of other site-specific actions which have been taken by the Department of Interior and which were analyzed in the various regional EIS's and studies listed above, see FISCAL 1979 COAL REPORT, *supra* note 21, at C-2 to C-14.

169. For example, the socioeconomic and environmental impacts in a specified region can be used for those areas that are within both existing and new regions.

170. 44 Fed. Reg. 42,609 (1979), *codified at* 43 C.F.R. § 3400 (1979); FEDERAL COAL EIS, *supra* note 22; SECRETARIAL ISSUE DOCUMENT, *supra* note 33.

171. See notes 298-308 and accompanying text, *infra*. Readers familiar with federal coal regulation will note the absence of any significant discussion herein regarding coal bidding systems, fair market value (FMV) determinations and diligent development requirements. This omission is not an oversight, but an exclusion caused by three factors. First, part III focuses principally on the *key distinctions* between the EMARS program and the new FCMP. Many of the issues attendant to bidding systems, FMV and diligence requirements are not distinctly

For a complete understanding of the FCMP, it is essential for the reader to go directly to applicable statutes, regulations, the final programmatic EIS, the SECRETARIAL ISSUE DOCUMENT, and the massive number of issues papers, memoranda, and studies that have been prepared over the last two years in anticipation of initiating new federal coal lease sales.

### 1. General Outline of the Preferred Coal Program

The preferred coal program selected by Secretary Andrus and described in detail in the final programmatic EIS contains eight major elements:<sup>172</sup>

- a. A planning system involving close consultation with state and local government, industry, and the public designed to (i) decide which areas of federal coal reserves are acceptable locations for coal production, and (ii) delineate, rank, and select specific tracts of coal for sale;
- b. A system for evaluating the national demand for coal and for

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different for either system. Second, these issues are treated significantly elsewhere. Finally, these specific issues appropriately deserve more detailed attention than can be provided in this article. See Humphreys, *Existing Federal Coal Leaseholds—How Strong is the Hold?*, 25 ROCKY MTN. MIN. L. INST. 5-1, 5-19 (1979); Krulitz, *Management of Federal Coal Reserves*, 24 ROCKY MTN. MIN. L. INST. 139, 158 (1978); FEDERAL COAL EIS, *supra* note 22, at 3-60 to 3-74; SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 83-105, 153-78; OFFICE OF TECHNOLOGY ASSESSMENT—CONGRESS OF THE UNITED STATES, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND: CURRENT STATUS AND ISSUES, at 147-67 (1979); BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, FINAL REPORT AND RECOMMENDATIONS FOR THE SECRETARY ON FAIR MARKET VALUE AND MINIMUM ACCEPTABLE BIDS FOR FEDERAL COAL LEASES (1979); McGee & Dahl, *The Federal Coal Leasing Waltz*, 80 W. VA. L. REV. 455 (1978).

<sup>172</sup> FEDERAL COAL EIS, *supra* note 22, at 3-2.

With the determinations made by Secretary Andrus regarding the preferred program, several other alternatives are briefly described and dismissed in the final EIS, including:

- (1) No federal leasing. (Under this alternative, no new federal coal would be leased until at least 1985);
- (2) Processing of outstanding preference right lease applications. (Under this alternative, only PRLAs would be processed and leases issued which met the commercial quantities test, and no other federal leasing would occur until at least 1985);
- (3) Emergency leasing. (Under this alternative, limited competitive leasing would occur, including relatively small amounts of coal to avoid bypassing federal coal and maintain existing operations);
- (4) Leasing to satisfy industry's indications of need. (This alternative would effectively continue the processes established in EMARS as proposed in September, 1975);
- (5) State determination of leasing levels. (Under this alternative, the states would have the responsibility to determine the timing and extent of new federal coal leasing. As such, the state would have "veto power" over which leases would finally be issued);
- (6) Leasing to meet DOE production goals. (This alternative would permit the DOE regional production goals to drive the tract selection process. DOE would select the regional leasing targets; no adjustment in DOE national production projections would occur);
- (7) Two other alternatives not seriously considered were:
  - a) EMARS I, the basic principal of which was that coal development on federal lands should stem from government interests. Many of the aspects of the EMARS I proposal have either been incorporated into the preferred alternative or were superceded by subsequent legislative changes; and
  - b) Development of federal coal resources by the federal government. While this alternative was mentioned in the 1975 EMARS Programmatic Environmental Statement, Interior believes Congress is unlikely to approve legislation removing coal development responsibility from the private sector. As stated in the FEDERAL COAL EIS, "the alternative is unreasonable and does not need to be analyzed." (FEDERAL COAL EIS, *supra* note 22, at 3-10 to 3-13.)

- determining production which should be stimulated by the leasing of federal coal;
- c. Procedures to conduct lease sales and issuance;
- d. Post-lease enforcement of terms and conditions;
- e. Procedures to manage existing leases issued prior to implementation of the new program;
- f. Procedures to process existing preference right lease applications;
- g. A strategy to integrate the environmental analysis requirements of NEPA into the new program; and,
- h. Procedures for new program start-up and for offering lease sales in emergency situations.

## 2. Land Use Planning

The most significant difference between the preferred FCMP and the EMARS II program<sup>173</sup> is the re-orientation of the lease sale process with regard to land use planning. Specifically, the EMARS II system required Interior to issue a call for expressions of interest from the coal industry in the *first stages of the coal program*. Following receipt of industry nominations and the public's disnominations regarding tracts for coal lease sales, BLM and other federal agencies were authorized to begin the land use planning phase of the program.<sup>174</sup> Under the new FCMP, Interior's "call" for expressions of leasing interest from coal companies, utilities and others is issued as the first step in the *tract selection process*.<sup>175</sup> The tract selection process, as the figures below illustrate, begins only after completion of the major phases of the land use planning programs of Interior.<sup>176</sup> Thus, Interior has re-oriented the stages of the coal program significantly, and expressions of industry interest will only come some time in the midst of the "activity planning process."<sup>177</sup>

Sections 3420.1-5 through 3420.2-1 of the final coal rules describe the land use planning process necessary on lands administered by BLM *before* those lands will be deemed acceptable for further consideration and *before* calls for expressions of coal industry interests are announced.<sup>178</sup> The provisions of the new FCMP regarding land use planning are designed to be consistent with other resource management planning regulations issued by BLM on August 17, 1979.<sup>179</sup> The part 1600 regulations establish a planning system for public lands and resources in general as authorized by the Federal Land Policy and Management Act of 1976. The part 1600 rules compliment other BLM land use rules, including the part 3400 coal regulations, as well as land use regulations being established by the Forest Service under the

173. See notes 58-62 and accompanying text, *supra*.

174. *Id.* See also regulations implementing EMARS II, codified at 43 C.F.R. § 3500 (1979).

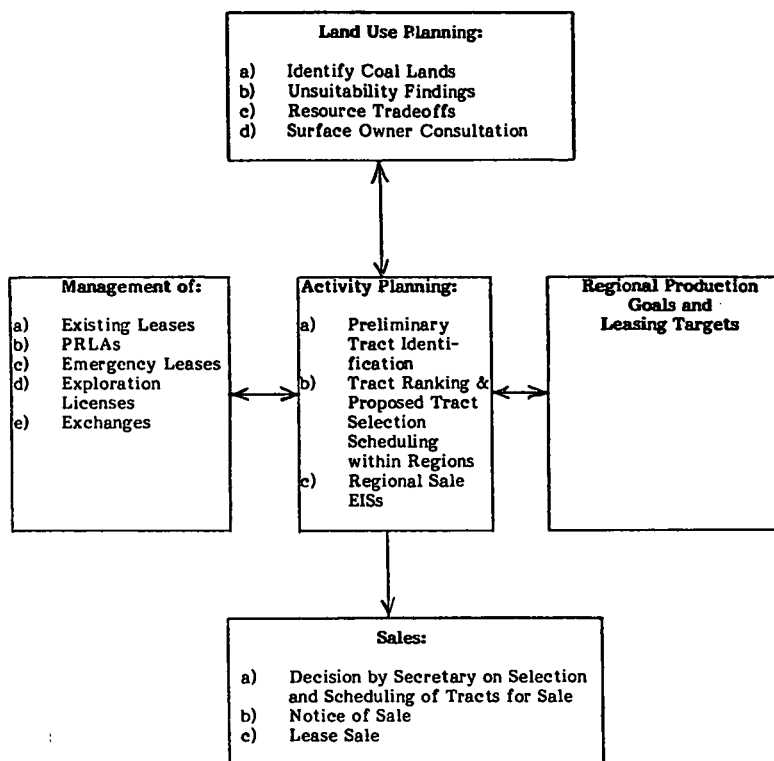
175. 43 C.F.R. § 3420.4-4 (1979).

176. Figures 3 to 6, *infra*, were adapted from the FEDERAL COAL EIS, *supra* note 22, at 3-14 to 3-16 and the DRAFT COAL EIS, *supra* note 163, at 3-15 through 3-17.

177. See Figure 5, middle portion.

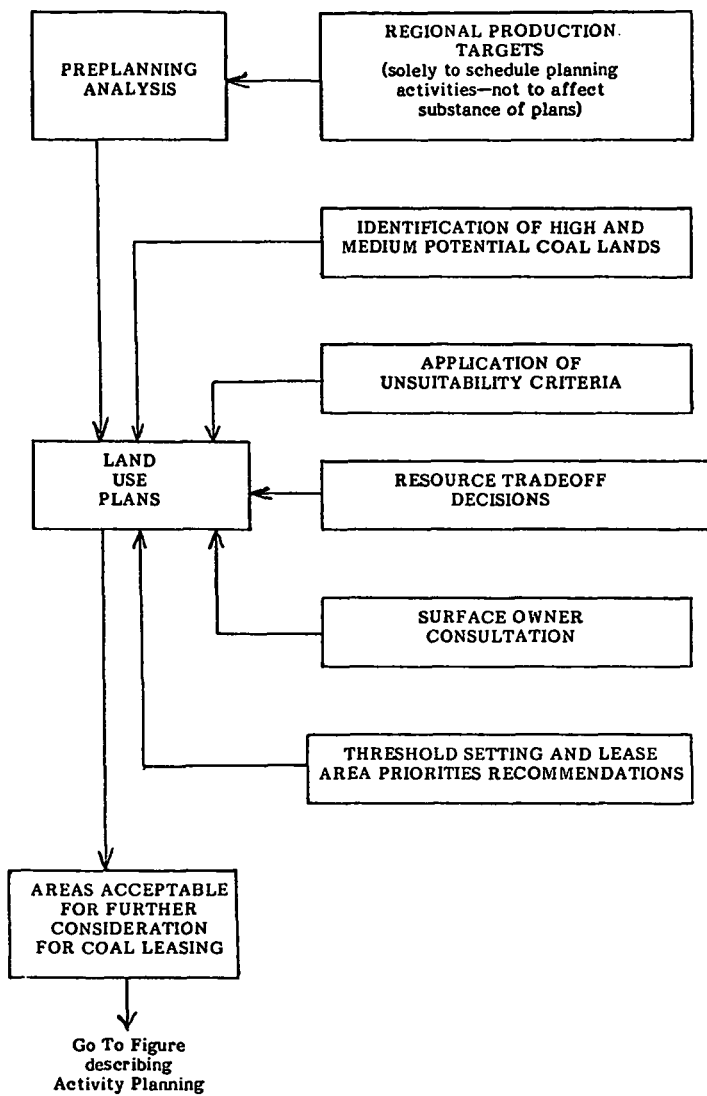
178. 43 C.F.R. §§ 3420.1-5 to 3420.2-1 (1979).

179. 43 C.F.R. § 1600 (1979).

**SUMMARY OF PREFERRED PROGRAM\***

\* For more detailed presentations of the preferred federal coal management program, see next three Figures.

**FIGURE 3**

**PREFERRED PROGRAM: BLM LAND USE PLANNING****FIGURE 4**

## PREFERRED PROGRAM: ACTIVITY PLANNING

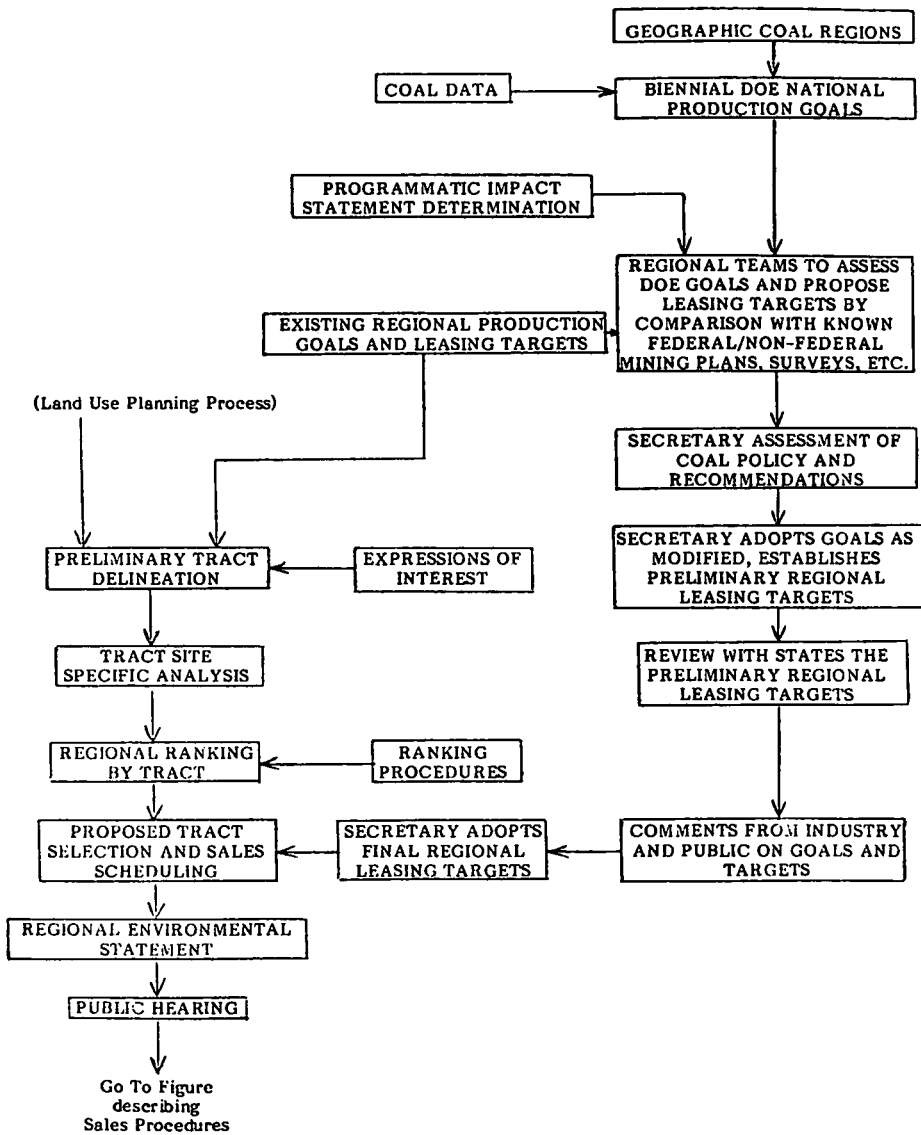
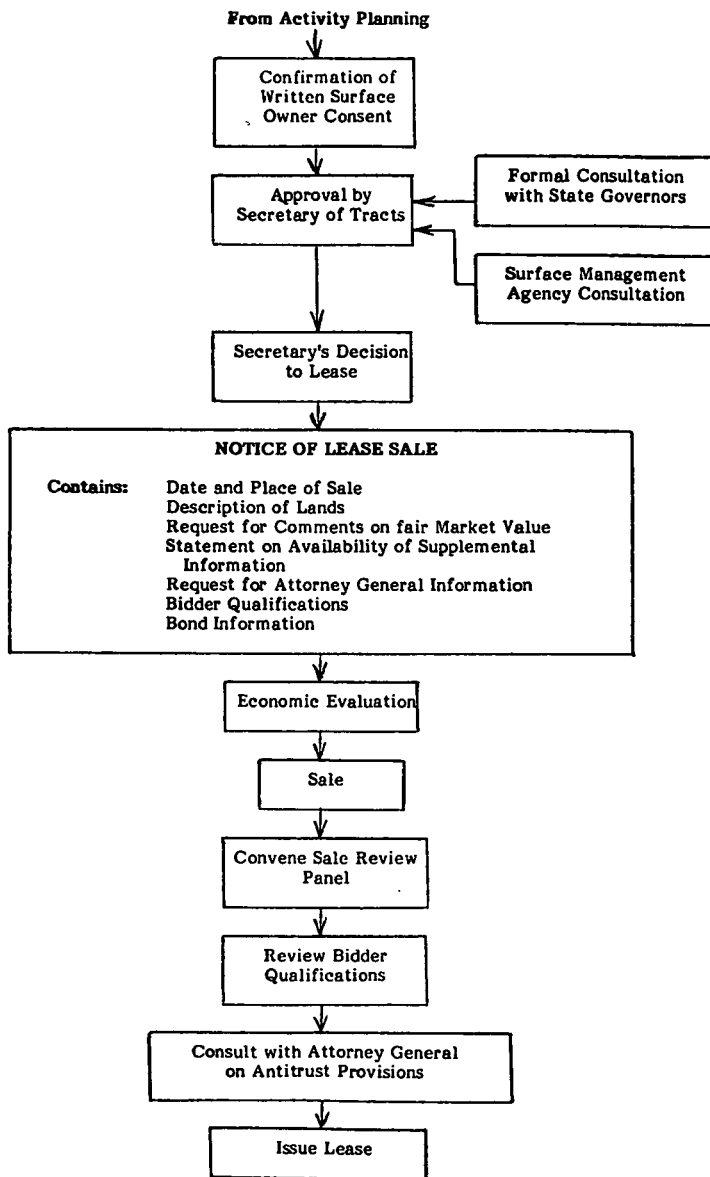


FIGURE 5

**PREFERRED PROGRAM: SALES PROCEDURES****FIGURE 6**

authority of the Forest and Rangeland Renewable Resources Planning Act of 1974.<sup>180</sup>

The threshold responsibility of the BLM to determine areas for future federal coal leasing is subsumed into a "screening" process which results in the designation of land areas acceptable for further consideration for coal leasing.<sup>181</sup> The following process will be used to determine such acceptable areas:

- a. Only areas with high or moderate development potential coal deposits are to be considered for leasing;
  - (i) The determination of high or moderate development potential will be based on the GS Coal Resource Occurrence-Coal Development Potential (CRO-CDP) maps;
  - (ii) As well, coal companies, states and the public may submit non-confidential coal geology and economic data during the early inventory planning phase for consideration regarding designation of coal areas as high or moderate potential;<sup>182</sup>
- b. "Unsuitability Criteria" will be applied to assess where there are areas unsuitable for all or certain types of surface mining operations. Areas considered unsuitable for all types of surface mining operations shall not be acceptable for further leasing consideration;<sup>183</sup>
- c. Additional unsuitability designations may occur where multiple land use decisions are made for certain coal deposits to protect other resource values "of a locally important or unique nature not otherwise included in the general unsuitability criteria";<sup>184</sup>
- d. Areas may be eliminated from further lease consideration where a significant number of qualified surface owners have expressed a preference against mining by other than underground mining techniques. Certain exceptions to elimination of areas based on "surface owner consent" are permitted in the proposed rules;<sup>185</sup>
- e. Land use plans may set "impact thresholds to manage coal development." These thresholds are defined as pre-set levels or rates of coal development, measured by impacts on natural, social or economic resources. Where a threshold is exceeded, BLM may halt, suspend, or condition further consideration of the areas acceptable for leasing;<sup>186</sup> and, finally,
- f. If, in the judgment of the federal land manager, areas which are otherwise acceptable for consideration contain more reserves than are likely to be needed for leasing over the life of

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180. 16 U.S.C. §§ 581(h), 1601-1614 (1979).

181. 43 C.F.R. § 3420.2-3 (1979).

182. *Id.* § 3420.2-3(b)(1)-(3).

183. *Id.* § 3420.2-3(c).

184. *Id.* § 3420.2-3(d).

185. *Id.* § 3420.2-3(e)(1)-(3). *See also* the surface owner consent provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1304 (Supp. II 1978).

186. 43 C.F.R. § 3420.2-3(f) (1979).



the land use planning unit, the plan may specify broad areas greater than 60,000 acres for earliest consideration for leasing, if any leasing is to be done.<sup>187</sup>

### 3. Regional Coal Teams

Throughout the development of the new FCMP, Interior worked closely with the six major coal-producing states in the West to insure close cooperation among the various federal and state agencies which would play a major role in implementation of the program.<sup>188</sup> Final regulations establishing state/federal Regional Coal Teams (Teams) formalize Interior's commitment to close state/federal relations in administering program functions and ensured the consideration of cumulative, region-wide impacts of coal development decisions.<sup>189</sup>

Each Team is comprised of the following members:

- One BLM field representative for each State in the coal region (this representative will be the State BLM Director or his designated representative);
- The governor of each State, or his designee; and
- A representative appointed by and responsible to the Director of BLM.<sup>190</sup>

As determined in several meetings between Interior and representatives of the major coal-producing states, these Teams will necessarily have more than three representatives. This decision stems from the geological fact that all coal regions extend beyond single state borders. Thus, each Team will have at least five representatives: two governors or their representatives, two state BLM directors or their designees, and one member appointed by the national BLM director.<sup>191</sup> Section 3400.4(b) of the final coal program regulations outlines the general responsibilities of the Teams:

Each regional coal team shall consider and recommend policy for regional target setting, tract delineation, site-specific analysis in the coal production region, guide and review tract ranking, and conduct the selection and sale scheduling process in order to recommend regional lease sale alternatives to be analyzed in the regional lease sale environmental impact statement and to be recommended to the Secretary [of Interior] . . . .<sup>192</sup>

Following completion of the final regional lease sale environmental statement, the Chairman of the Team<sup>193</sup> will submit the recommendations of the Team to the BLM Director. The Director then will submit the final regional environmental statement to the Secretary of Interior with recom-

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187. *Id.* § 3420.2-3(g).

188. Letter from Secretary of Interior Cecil Andrus to Colorado Governor Richard Lamm (April 28, 1978).

189. 43 C.F.R. § 3400.4 (1979).

190. *Id.* § 3400.4(a).

191. Regional Coal Teams have been established for the following coal regions: Green River-Hams Fork, Uinta-Southwestern Utah, Powder River, Fort Union, San Juan River, Denver-Raton Mesa, Western Interior (Oklahoma Subregion), and Southern Appalachian (Alabama Subregion).

192. 43 C.F.R. § 3400.4(b) (1979).

193. Designated by rule as the National BLM Director's representative. *Id.* § 3400.4(a).

mendations for his decision.<sup>194</sup> Other Team responsibilities include serving as the general state and federal forum for all other major DOI coal management program decisions in the region regarding preference right lease applications, public body and small business set-aside leasing, emergency leases, exchange, and readjustment of lease terms and exploration licenses.<sup>195</sup>

#### 4. Regional Production Goals and Leasing Targets

The need for additional coal leasing has been the focal point of much of the controversy surrounding Interior's efforts to manage the federal coal resource. Precise determinations of the tonnage of federal coal which should be leased to meet future energy requirements are not now feasible. A statistical assessment of the need for additional federal coal leasing is necessarily a dynamic process which changes according to the assumptions used in the analysis as well as the specific data included in the forecasts. Resulting from Secretary Andrus' perception that a continual reassessment of leasing needs should be an integral part of the preferred coal program, the Secretaries of Interior and Energy have established regional production goals and leasing targets which will be updated continually to permit modification of leasing activity in response to changes in projected demands for coal.<sup>196</sup>

Under the terms of a Memorandum of Understanding (MOU) between the Departments of Interior and Energy,<sup>197</sup> the Secretary of Energy will submit proposed regional production goals to the Secretary of Interior. The determination of regional goals for specific types of coal will be guided principally by industry indications of interest submitted at the start of the activity planning process.<sup>198</sup> It is expected that DOE will focus on macro-economic issues regarding the energy needs of the nation's economy and will consider comments from DOI and other diverse sources for the formulation of national energy goals and the role of coal production in meeting these goals.<sup>199</sup> Once final DOE regional coal production goals are established, they will be presented to the regional coal teams for evaluation as to how the goals might affect leasing strategies and decisions.<sup>200</sup> The Team will then analyze the goal on the basis of its tract ranking and selection experience, its detailed knowledge of the region, and public comments received following publication of the regional goal in the Federal Register and a public hearing in the region.<sup>201</sup> The Team's recommendation for a regional leasing target (on a reserved tonnage basis) will be provided to the Secretary of Interior for the next four year period.<sup>202</sup>

Based on the recommendations of the Team, the Secretary of Interior

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194. *Id.* § 3400.4(e).

195. *Id.* § 3400.4(d).

196. FEDERAL COAL EIS, *supra* note 22, at 3-57.

197. *Id.* at Appendix B. Regional coal production goals will be adopted annually by the Secretary of Interior following consultation with DOE, affected State Governors, Indian tribes and other concerned parties. 43 C.F.R. § 3420.3-1(b) (1979).

198. 43 C.F.R. § 3420.4 (1979).

199. *Id.*

200. *Id.* § 3420.3-2(d) (1979).

201. *Id.*

202. FEDERAL COAL EIS, *supra* note 22, at 3-58.

will adopt final regional production goals and will also adopt preliminary regional leasing targets for logical mining units which will be composed of or include Federal coal leases.<sup>203</sup> The preliminary regional leasing targets will reflect the difference between desired levels of production and the estimated production that would occur without new federal coal leasing. The targets will include federal and non-federal coal and will be published for public review and transmitted to the Teams.<sup>204</sup>

Final DOE regional production goals, as adopted by the Secretary, and both preliminary and final regional leasing targets, will be used by federal and state governments to establish data gathering and planning priorities to insure that a sufficient number of federal coal tracts will be available in the future, and that adequate site specific information will be available to make the coal management process workable. The final regional leasing targets will specifically guide the Teams in the selection and scheduling of ranked tracts for the four year proposed lease sale programs in each respective region.<sup>205</sup> Regional leasing targets will be adjusted on a biennial basis and will afford the opportunity for trade-offs in production goals and leasing targets between regions.<sup>206</sup>

This process necessarily requires that the Departments of Interior and Energy have informed estimates of likely production from all lands, including existing leases. This information will be generated essentially from outside sources, including information held by DOE, the National Coal Association, and the Keystone Coal Manual.<sup>207</sup> For existing leases, Interior has relied heavily on estimates from pending and approved mining plan applications and inquiries and conversations with lessees. To make the information easily available and accurate, Interior has developed a new automated coal data system which centralizes all information on coal leases for the first time. The information in this system should contain the best available estimates of planned and potential future production from coal leases.<sup>208</sup> As will be discussed more fully later,<sup>209</sup> the establishment and use of regional coal production goals and regional leasing targets have become a central issue of debate in the development of the new coal program.

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203. 43 C.F.R. § 3420.3-2(e) (1979).

204. *Id.* § 3420.3-2(f), (g).

205. FEDERAL COAL EIS, *supra* note 22, at 3-59.

206. *Id.* See also 43 C.F.R. § 3420.3-2(k), (l) (1979).

207. For an extensive discussion of how coal data will be used to manage particularly existing leases and preference right lease applications, see *Memorandum from the Director, Office of Coal Leasing, Planning and Coordination to Under Secretary of Interior James Joseph, Discussion Paper on Departmental Management of Existing Coal Leases and Preference Right Lease Applications* (March 20, 1979), republished in FEDERAL COAL EIS, *supra* note 22, at I-1 to I-47 [hereinafter cited as *Existing Lease Memo*].

208. *Id.* Whether or not the coal data system will contain the best available information for use in the coal program continues to be an extremely divisive issue. The General Accounting Office published a severely critical report of DOI's estimates of western coal reserves. The report states:

In order for the Government to make sound coal leasing policy decisions to manage the federal coal leasing program effectively, and to comply with federal law, accurate and reliable estimates of these reserves are essential. Timing also is important because many of the 537 outstanding leases may require "diligent development" de-

## 5. Major State Participation in the Federal Coal Program

As stated earlier,<sup>210</sup> Interior made a concerted effort to involve the major coal-producing states in the West in development of the proposed coal program. The states of Montana, Wyoming, North Dakota, Utah, New Mexico, and Colorado, working through the auspices of the Western Interstate Energy Board (WIEB), established a Coal Committee comprised of one governor-appointed representative from each state to work closely with the Office of Coal Leasing Planning and Coordination (OCLPC). Primarily as a result of the extensive staff effort in working with the Department of Interior, the states were able to realize a significantly greater role in the federal coal program than has ever before been acknowledged. The major components of this increased state responsibility are outlined in this subsection.

(a) *Regional Coal Production and Leasing Targets.* The Regional Coal Team (Team) will receive the Department of Energy's (DOE) final regional production goals and related Department of Interior (DOI) information and may recommend changes in the region's production goals to the Secretary of Interior based on a number of factors, including state development policies.<sup>211</sup> As well, preliminary and final regional leasing targets may be revised by the Teams based on an evaluation of: (1) the expected and potential production for existing coal leases; (2) noncompetitive coal leases, non-federal coal holdings and expected non-federal leasing; and (3) the level of competition within the coal region.<sup>212</sup> The Secretary must also consult with governors of affected states before adopting final regional production goals and leasing targets.<sup>213</sup>

The final regional leasing targets will be used to guide the Teams when ranking and selecting federal coal tracts for sale. The Team, however, with the approval of the Secretary of Interior, may revise final regional targets based on a number of broad criteria, including the level of support for development by state and local governments prior to adoption of a lease sale schedule by the Secretary.<sup>214</sup>

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terminations prior to June 1, 1986. Most federal leases had no coal production before 1977.

However, Interior and leaseholder estimates of recoverable coal reserves are *not* accurate or reliable.

In a previous report on the federal coal leasing system, GAO stated that Interior should have as clear a conception as possible of the potential contribution of federal lands toward meeting the national coal production goal. At that time, GAO concluded that the estimates on existing leases did not provide a sound basis for forecasting production potential. That conclusion has *not* changed.

U.S. GENERAL ACCOUNTING OFFICE, INACCURATE ESTIMATES OF WESTERN COAL RESERVES SHOULD BE CORRECTED, REPORT NO. EMD-78-32 (1978) [hereinafter cited as GAO WESTERN COAL RESERVES REPORT].

209. See notes 241-51 and accompanying text, *infra*.

210. See note 188, *supra*.

211. 43 C.F.R. § 3420.3-2(d), (i) (1979).

212. *Id.* § 3420.3-2(e)(2).

213. *Id.* § 3420.3-2(i),(j).

214. *Id.* § 3420.3-3(b)(1)-(6). Circumstances justifying a revision of a final regional leasing target include:

- (1) Expressed industry interests in coal development in the region not reflected in the final regional leasing target;

(b) *Land Use Planning and Unsuitability Designations.* BLM's land use planning regulations provide for close coordination between the state and federal governments and include provisions for execution of cooperative agreements.<sup>215</sup> As well, the state may submit coal, geology, and economic data during the earlier inventory phase of planning.<sup>216</sup>

In the application of the unsuitability criteria and exceptions thereto, the states are given concurrent power in many cases.<sup>217</sup> Prior to assessing federal lands as unsuitable for coal mining, the Secretary must consult with state and local agencies.<sup>218</sup> Finally, before adopting a land use plan that makes any formal assessment of land acceptable for further consideration for leasing, BLM must consult with governors of affected states and the state agency charged with the responsibility for maintaining the state's unsuitability program.<sup>219</sup>

(c) *Tract Delineation, Ranking, Selection, and Lease Sale Scheduling.*

(1) *Tract Delineation.* The Team determines the location, priority, and timing of both preliminary tract delineation and site-specific environmental inventory and analysis, subject to limitations of data availability, budget, and manpower.<sup>220</sup>

(2) *Tract Ranking.* The Team also determines the ranking factors and ranks specific coal tracts.<sup>221</sup>

(3) *Tract Selection and Lease Sale Scheduling.* The Team selects tracts

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- (2) Expressed interests and reasons therefor from a community or group of communities for or against coal development in the adjacent and surrounding areas;
  - (3) Expressed interests for special opportunity sales;
  - (4) Adjustments indicated by the success or failure of the scheduled lease sales in meeting the final regional leasing targets;
  - (5) An expressed desire on the part of the state or local government to shift or disperse development patterns in the region or sub-region by additional leasing, reductions in leasing, or shifts in locations of lease sales; and
  - (6) Results from the analyses contained in the regional lease sale environmental statement.

215. *Id.* § 1601.4-4-3. These rules were issued separately from the FCMP regulations. The Part 1600, Planning, Programming and Budgeting rules cover all BLM-managed public lands, not merely federal coal lands. The use of cooperative state/federal agreements is expressly emphasized at § 1601.4-(b) which states,

To facilitate coordination with State government, State Directors shall seek written agreements with Governors or their designated representatives on procedural topics such as exchanging information, providing advice and participation, and time frames for receiving State government participation and review in a timely fashion. If an agreement is not reached the State Director shall provide opportunity for Governor or State agency review, advice, and suggestions on issues and topics that the State Director has reason to believe could affect or influence State government programs.

Final coal leasing targets for the Green River-Hams Fork coal region are republished at 45 Fed. Reg. 11,919 (1980).

216. *Id.* §§ 3420.2-3(b)(3), 1601.5-4.

217. *Id.* §§ 3420.2-6, 3641.1, 3461.3-2. See specifically criteria numbers 7 § 3461.1(q) (historic preservation); 15 § 3461.1(o) (fish and wildlife habitat); 19 § 3461.1(s) (alluvial valley floors); and, 20 § 3461.1(t) (state-specific criteria).

218. *Id.* § 3420.2-6.

219. *Id.*

220. *Id.* §§ 3420.4-3(h), 3420.1-5(c)(7).

221. *Id.* § 3420.4-4.

for inclusion in alternative lease sale schedules and submits these to the Secretary of Interior for his final selection.<sup>222</sup> Finally, the Secretary of Interior in consultation with the governor of an affected state may initiate or postpone the process to respond to considerations such as planning, updates, new tract delineations, and changes in production targets.<sup>223</sup>

(d) *Lease Sales and Related Issues.* The Secretary of Interior must consult with the governor on any proposed lease sale. The governor will have between thirty and sixty days to comment on the proposed sale, with an option for a longer period when proposed leases are located in national forests.<sup>224</sup> As noted earlier,<sup>225</sup> the Teams will each have at least two state representatives in addition to federal representatives, and the Teams shall serve "as the forum for Department/state consultation and cooperation in all other major Department coal management program decisions in the region concerning preference right lease applications, public body and small business set aside leasing, emergency leasing and exchanges."<sup>226</sup>

Finally, the Secretary of Interior must give the governor of an affected state forty-five days to comment on any proposed lease exchange. If the governor objects to the exchange, the Secretary may not exchange the lease for six months during which time the governor may submit data for the Secretary's reconsideration of the lease proposals.<sup>227</sup>

#### IV. PROGRAM IMPLEMENTATION—MAJOR PITFALLS AND RECOMMENDED CHANGES

##### A. *The Need for Leasing and Coal Data Requirements*

The failure of the Department of Interior to establish a convincing case on the need for additional federal coal leasing has been the Achilles' heel which has effectively short-circuited the issuance of new federal coal leases. As stated by Judge Pratt in his 1977 decision in *NRDC v. Hughes*,

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222. *Id.* § 3420.4-4(c).

223. *Id.* § 3420.5-3.

224. *Id.* The opportunity for governors' comments on particular proposed lease sales was the subject of a great deal of discussion and debate between state representatives and the Department of Interior in development of the new coal program. The subject was initially proposed by state representatives in negotiations with the Department of Interior that the governor of an affected state be authorized to comment on a proposed federal coal lease sale whether or not the particular lease sale would take place within the National Forest System. Initially, Interior would not acquiesce in this request which decision led to major arguments during the negotiations. Finally, after failing to establish a reasonable rationale for distinguishing between National Forests and other federal lands, Secretary Andrus authorized the inclusion of the comment for all proposed federal coal lease sales.

This requirement was originally included in the Federal Coal Leasing Amendments Act of 1976 which states,

Any lease proposal which permits surface coal mining within the boundaries of National Forest which the Secretary [of Interior] proposes to issue under the chapter shall be submitted to Governors of each state within which the coal deposits subject to such lease are located. No such lease may be issued under this chapter before the expiration of the 60-day period beginning on the date of such submission.

30 U.S.C. § 201(a)(2)(B) (1976).

225. See notes 188-95 and accompanying text, *supra*.

226. 43 C.F.R. § 3400.4(d) (1979).

227. *Id.* § 3435.3-6.

Absent from the draft programmatic EIS was any mention or consideration of the first alternative of 'no action'. This is the most significant alternative, since only an adequate explanation for its rejection can provide the new program with its very *raison d'être*. The detailed consideration of 'no action' and its thoughtful rejection by the Department, would have laid the groundwork for the consequent implementation of the new policy. Yet the draft was silent on this point. Since this option was not included in the DEIS and since a second draft was not issued for comment, the public as well as governmental agencies were deprived of their statutory right to comment thereon . . . . The final statement perfunctorily devoted a few paragraphs to the 'no action' alternative. Apparently, the Department and the BLM believed this to be sufficient to fulfill their regulatory obligations which specifically require the consideration of the 'no action' alternative. It appears, however, that the Department's treatment of this alternative is sufficient neither under the statute nor under the regulations.<sup>228</sup>

Recognizing the importance of a full discussion of the need for additional coal leasing, the Department of Interior has expanded, in both the draft and the final programmatic EISs, the Department's determination that additional federal coal leasing is needed.<sup>229</sup> The final programmatic EIS places the rationale for the decision that additional federal leasing is necessary on four principal factors:

- (1) Additional leasing would give the United States greater assurance of being able to meet its national energy objectives;
- (2) New leasing would also provide a means to promote a more desirable pattern of coal development. It may be possible to lower overall production costs and reduce the adverse environmental impacts resulting from coal mining by altering coal development patterns;
- (3) A resumption of leasing would offer significant legal and administrative advantages for the Department of Interior; and
- (4) Finally, the state of competition in the western coal industry would be improved by new leasing.<sup>230</sup>

Of the four factors listed above to support the Department's decision to resume federal coal leasing, the first appears to be the least convincing. After devoting a full eight pages to a discussion of "leasing to meet national energy objectives," the Department concludes that,

The principal consequences of leasing less federal coal than is needed to meet national energy objectives would likely be to alter patterns of coal development, both at national and regional levels. At least on the basis of computer projections, *it appears improbable that total national coal production would be greatly reduced.*<sup>231</sup>

A far more convincing argument for additional federal coal leasing is presented in the final EIS regarding more desirable coal development pat-

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228. 437 F. Supp. 981, 990, 991 (D.D.C. 1977) (footnotes and citations omitted).

229. See DRAFT COAL EIS, *supra* note 163, at 2-43 to 2-53; Federal Coal EIS, *supra* note 22, at 2-48 to 2-61.

230. FEDERAL COAL EIS, *supra* note 22, at 2-48 to 2-50.

231. *Id.* at 2-58 (emphasis added).

terns. The checkerboard nature of federal, state and private lands, particularly in the Powder River and the Green River-Hams Fork coal regions, strongly indicates that *development of non-federal coal mines in these checkerboard areas will be extremely difficult without new federal leasing*.<sup>232</sup> If federal coal is not available, non-federal coal mines will probably be developed in inefficient sizes and configurations, resulting in increased mining costs and more environmentally damaging impacts. Further, some existing operations will probably shut down and additional bypass and window situations will develop.<sup>233</sup>

Finally, even without initiation of new competitive leasing, Interior has little choice legally but to process outstanding preference right lease applications and to issue noncompetitive leases for those applicants able to show commercial quantities of coal.<sup>234</sup> In circumstances where applicants are seeking preference right leases in environmentally unsuitable areas, Interior intends to exchange or purchase such areas in order to avoid unnecessary environmental impact. If no new federal leasing takes place, pressures for development of existing leases and areas covered by preference right lease applications will undoubtedly be increased.<sup>235</sup>

Assuming that Interior has presented a legally defensible rationale supporting the need for additional federal coal leasing, the next issue to be addressed is a *defensible lease schedule*. Secretary Andrus has established the following schedule for leasing:

January 1981—Green River-Hams Fork Coal Region (set to meet leasing target of 531 million tons);

July 1981—Uinta-Southwestern Coal Region (set to meet leasing target of 109 million tons);

January 1982—Powder River Coal Region (set to meet leasing target of 621 million tons).<sup>236</sup>

The specific lease schedule as set by the Secretary, however, as well as the time frame within which the new FCMP was developed, have been and continue to be major points of debate. Western state governors, working through the Coal Committee to the Western Interstate Energy Board, expressed concern about the timetable for preparation of the programmatic EIS and implementation of the coal program in mid-1978. A letter dated June 29, 1978, from the governors of the States of Utah, New Mexico, Colo-

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232. *Id.* Because coal in the Uinta-Southwestern Utah Coal region is largely owned by the federal government, this region is also relatively more dependent on federal leasing for expanded production beyond already planned and committed levels. On the other hand, there are major holdings of non-federal coal which could be developed without federal leasing in the Fort Union and Denver-Raton Mesa coal regions. The San Juan River coal region also appears somewhat less dependent on new federal leasing because of the presence of Indian coal and some substantial blocks of developable non-federal coal.

233. *Id.* at 2-59.

234. *Id.* at 2-60. For a discussion of the preference right lease situation see Johns, *Federal Preference Right Coal Leases: How Much "Right" Really Exists?*, 12 NAT. RESOURCES LAW. 389 (1979).

235. *Id.* at 2-61.

236. SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 57-61. Note, Secretary Andrus has also set a lease sale for July 1981 for the Alabama Coal Region but has not yet set a leasing target. Each of the leasing targets is based on a schedule to meet medium DOE projections of coal production.



rado, Wyoming, Montana, North Dakota, and South Dakota submitted an initial list of concerns and recommendations regarding the early phases of development of the program. The letter states in part:

We western coal state governors have been pleased with the opportunity you have extended to us to participate in the development of a new federal coal leasing system. *While we are concerned that your tight timetable may prove unworkable*, we hope that the working relationship the Department has established with us in these early stages will continue.<sup>237</sup>

Despite continual requests from western state governors to delay ultimate decisions on the preferred coal program, the program was set for implementation by June 1979, as originally scheduled. The first test of the program is now underway in the Green River-Hams Fork region of Colorado and Wyoming. As expected, time constraints are plaguing the first actions of the Regional Coal Team (Team) in its attempts to hold the first competitive lease sale in January 1981.<sup>238</sup> Perhaps the principal reason that delays seem inevitable is the continual debate over the adequacy of the coal data being used by Interior to determine leasing targets. Interior itself admits that the development of leasing goals and targets must necessarily undergo continual revisions.<sup>239</sup> Regional coal production forecasts initially developed by the Department of Energy in June 1978 were revised only one year later and are now being used by the Teams to develop leasing targets.<sup>240</sup>

Problems continue to surface with the statistical coal data, however. For example, the final leasing target for the Green River-Hams Fork (GR-HF) region has changed three times since the GR-HF Team began meeting. The target was initially raised from 321 million tons to 416 million tons based on a change in a variety of assumptions considered by the Team staff.<sup>241</sup> At the January 24 meeting of the GR-HF Team, Chairman Gary Wickes reported that Secretary Andrus had made a decision that although the 416 million tons leasing level would be the target for analysis, the Secre-

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237. Letter from Montana Governor Thomas Judge to Secretary Cecil Andrus (June 29, 1978).

238. See letter from Wyoming Governor Ed Herschler to Secretary Cecil Andrus (November 16, 1979).

239. See SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 68:

No matter how good the analysis of need for leasing, circumstances seldom remain sufficiently constant, and forecasts are not often precise enough, to permit the competitive leasing component of a coal management program to function continuously on the basis of a single assessment of leasing needs.

Accordingly, a continual reassessment of leasing needs would be incorporated as an integral and very public part of the preferred program. The reassessment would be conducted in a process which merges DOE production goals with advice from State and local governments, the coal industry and other interest groups to determine leasing levels. This process of continual reassessment of future regional coal needs would permit modification of leasing activity in response to changes in projected demand for coal.

240. COAL PRODUCTION FORECASTS, *supra* note 35; LEASING POLICY DEVELOPMENT OFFICE, U.S. DEPT OF ENERGY, INTERIM UPDATES TO 1985 AND 1990 REGIONAL FORECASTS (1979), *republished* at SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 65 [hereinafter cited as INTERIM UPDATES].

241. Meeting Minutes, Green River-Hams Fork Coal Region—Regional Coal Team Meeting, at 2 (October 14, 1979).

tary had also concluded that this figure should be increased 25 percent to take care of any contingencies that might come up. This raised the leasing target to 520 million tons as the basis for analysis in the regional EIS that would be prepared before the January 1981 lease sale.<sup>242</sup>

A detailed examination of the use of the regional leasing goals and targets was undertaken by industry and environmental representatives meeting as the Mining Task Force Coal Leasing Group (Task Force) of the National Coal Policy Project.<sup>243</sup> Although members of the Task Force have been unable to develop recommendations on the proposed FCMP prior to publication of the project's first report titled *WHERE WE AGREE*, a meeting held in November 1979 resulted in a comprehensive and far-reaching set of recommendations regarding the new federal coal program.<sup>244</sup> Stressing the

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242. Meeting Minutes, Green River-Hams Fork Coal Region—Regional Coal Team Meeting, at 2 (January 14, 1980) [hereinafter cited as *GR-HF Minutes*, January 14, 1980].

243. The National Coal Policy Project (NCPP) is sponsored by the Center for Strategic International Studies of Georgetown University. Initially conceived in 1976, the NCPP over the last several years has provided a unique forum where representatives of industry groups and environmental organizations meet and work together in developing policy recommendations for coal development in the United States. A brief history of NCPP is provided at the beginning of the project's first report titled *WHERE WE AGREE*:

The idea of the National Coal Policy Project (NCPP) originated with Gerald L. Decker, Corporate Energy Manager of the Dow Chemical Company, and certain of his colleagues in industry. They believed, . . . , that it was important for the United States to shift from the use of oil and natural gas to coal. It appeared to them, however, that this would not occur without a reconciliation of environmental and industrial interests.

In connection with Decker's service on the Federal Energy Administration's Environmental Advisory Committee, he met Laurence I. Moss, former Sierra Club president and chairman of that committee. Decker, with the support and encouragement of key executives of several major companies, approached Moss and other environmentalists in January 1976, to enlist their support for the project.

The environmentalists were not enthusiastic. Some had met with representatives from industry on previous occasions and found the discussions unproductive. The environmentalists felt they could not afford to set aside the considerable time required for the proposed project unless there was a reasonable likelihood that it would be productive. On the other hand, many of them were not fully satisfied with existing mechanisms for resolving disputes, and were receptive to exploring new approaches. From the environmental point of view, there was a growing feeling that industry had business to transact with the environmental movement (as it does with shareholders, labor unions, customers, and regulatory authorities). The lack of a non-adversarial forum to conduct such business was impeding progress on issues upon which agreement might be possible.

Five Task Forces were organized [following initial caucuses between representatives of the industry groups and environmentalists] to cover the spectrum of coal-related energy and environmental policy issues. They were: Mining, Transportation; Air Pollution; Fuel Utilization and Conservation; and Energy Pricing. Later on *ad hoc* task force, Emission Charges, was organized, drawing from members of the Air Pollution and Energy Pricing Task Forces. Each side was represented equally on each Task Force.

The participants in the project took part as individuals. Although they were selected in part because of their leadership roles in environmental and industrial organizations, they do *not* purport to speak either for their organizations or for the environmental and industrial communities at large. The issues are too complex and controversial for either side to speak with a single voice . . . .

GEORGETOWN UNIVERSITY, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, *WHERE WE AGREE—REPORT OF THE NATIONAL COAL POLICY PROJECT 1-5* (1978).

244. NATIONAL COAL POLICY PROJECT, MINING TASK FORCE—COAL LEASING GROUP, LAND USE PLANNING AND MARKET FORCES IN FEDERAL COAL MANAGEMENT, FOURTH DIS-

need to allow market forces to play a more significant role in coal leasing decisions, the Task Force concluded, in part:

Current procedures used by the Department of Interior to establish leasing schedules based on regional leasing targets derived from production goals set by the Department of Energy's forecast modeling are *too complex, unreliable and subject to manipulation*. A well-structured planning process that gives industry an active role in identifying potential lease areas and insures that the location and pace of actual leasing reflects environmental and social concerns should eliminate the need for setting regional leasing targets.<sup>245</sup>

The statistical modelling and the development of regional leasing targets that will drive the system has been an item of concern from the initial development phases of the new program. In submitting comments on the draft programmatic EIS in February 1979, Montana Governor Thomas Judge expressed concern with coal data:

The EIS recognizes that the primary demand for western coal is for electric generation. At least one Montana study of Montana coal demand . . . strongly contradicts the presumed need for the volume of coal which the EIS predicts the Montana portion of the Powder River Basin should be producing in 1985 and 1990 . . . . Since the EIS does not include the origin-destination matrices which show predicted coal flows between 41 production areas and 53 consumption areas, a state cannot precisely examine whether the projected market area demands for its coal are realistic . . . . The coal production targets are the primary determining factor underlying the proposed coal leasing policy and management framework. Considering the important role new federal leasing would play in the Powder River Basin and other western coal producing regions, greater accountability for the targets would be desirable. Congressional review and acceptance of DOE's coal production forecasts would not be unreasonable in light of the potentially massive impacts subsequent coal decisions will impose on the West.<sup>246</sup>

An even more critical review of Department of Interior efforts to estimate the potential contribution federal coal will make toward meeting national coal production goals was issued by the General Accounting Office in 1978. In stressing that Interior should have a clear conception of future production from federal lands, GAO concluded that new diligent development and continuous operations requirements established by the Department of Energy could "not be effectively or equitably applied because the reserve estimates are not accurate or reliable."<sup>247</sup>

The GAO also questioned the U.S. Geological Survey's (GS) reliance on reserve estimates which do not include all coal resources underlying the lease. Further, the GS recoverable reserve estimates are based on general

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CUSSION DRAFT (February 12, 1980) [hereinafter cited as DRAFT COAL PROJECT RECOMMENDATIONS].

245. *Id.* at 9.

246. Letter from Montana Governor Thomas Judge to BLM Director Frank Gregg (February 13, 1979), *republished* at FEDERAL COAL EIS, *supra* note 22, at K-152.

247. GAO WESTERN COAL RESERVES REPORT, *supra* note 208, at 27, 28.

recovery factors and not on detailed current economic analyses.<sup>248</sup>

In response principally to the GAO recommendation that Interior develop a computer capability to deal with the coal data, the Department has developed an automated coal data system which centralizes all information on coal leases. The information in the system should contain the best available estimates of planned and potential future production from coal leases.<sup>249</sup> Nevertheless, problems continue to develop as the Regional Coal Teams attempt to use these statistics to arrive at regional leasing targets and schedules. For example, more vigorous geological examinations and application of the unsuitability criteria as a result of the site-specific analysis forced significant revisions by the GS on coal reserve base figures on the sixteen tracts selected in the GR-HF coal region. The original reserve base for all sixteen tracts was a little over one billion tons. After the GS had examined twelve of the sixteen tracts, this reserve base was revised downward by roughly ten percent to 95.5 million tons.<sup>250</sup>

The major problems faced by Interior and the Department of Energy in the development of reliable federal coal statistics are derived from a variety of sources. No one suggests that the coal statistics are being deliberately manipulated to rationalize coal leasing targets. Clearly, though, coal statistics generated to date have not been accurate nor can one presume increased accuracy in the short term, because computer modelling is an on-going process which necessarily changes as more geologic data is accumulated through actual drilling and exploratory operations. Undoubtedly, the necessary data will not be comprehensive enough for the presently scheduled January, 1981 federal lease sales. Whether sufficient, accurate statistical data will ever be developed to serve the purpose originally envisioned by Interior in the new program is questionable.

While *GS coal reserve estimates* must necessarily be used to establish threshold levels for minimum acceptable bids in a competitive leasing process, these reserve estimates will become more accurate as specific geologic data is prepared. This contrasts significantly with *DOE's forecast modelling*, which is used to set regional leasing targets. The DOE modelling data

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248. *Id.* at 28. GAO made the following specific recommendations to the Secretary of Interior regarding western coal reserve data:

- (1) Publish reserve estimate methodology regulations for comment and hold the public hearing so that a standard methodology can be developed and understood between industry and government;
- (2) As an interim measure require the Geological Survey to use the published estimating criteria contained in GEOLOGICAL SURVEY BULLETIN NO. 1450-B for determining estimates and review and update all reserve estimates on existing leases. First priority would be given to producing leases and leases scheduled to come into production within the next five years to assure that the diligent development, continued operation, and advance royalty provisions will be accurately assessed. When diligent development or continued operation requirements are not met by the lessees, as required by law, the leases would be terminated;
- (3) Obtain from leaseholders reserve estimates, cost, and pricing data and develop procedures for analyzing this information in estimating recoverable reserves; and
- (4) Consider acquiring a computer capability to provide for more effective and timely determination of reserve estimates.

*Id.* at 29.

249. See *Existing Lease Memo*, *supra* note 207, at I-3.

250. *GR-HF Minutes*, January 14, 1979, *supra* note 242, at 1.

changes markedly as assumptions for the three coal production scenarios are revised.<sup>251</sup> The fuel mix in the United States appears, at least for the time being, a bit too dynamic and complex to presume regional leasing targets will be reliable or to presume that this data should be the key driving mechanism for the entire federal coal program. Finally, eliminating the regional leasing targets from the program will prevent Regional Coal Team meetings from becoming a "battle of the statisticians," a scene which has characterized many of the Team meetings to date.

### B. *Split DOI/DOE Responsibility*

Traditionally, the Department of Interior has retained responsibility for leasing and developing federal lands for energy resources. The passage of the Department of Energy Organization Act changed all this, however.<sup>252</sup> The Act transferred the leadership role to the Department of Energy (DOE) in making national energy policy and also transferred certain responsibility for federal mineral leases to the new department, including:

- (1) Setting production rates;
- (2) Fostering competition;
- (3) Implementing alternative bidding systems;
- (4) Establishing diligence requirements for operations on federal lands; and,
- (5) Specifying procedures, terms and conditions for the acquisition and disposition of federal royalty-in-kind.<sup>253</sup>

All authorities not specifically transferred by the DOE Organization Act are retained by the Department of Interior. Thus, Interior is solely responsible for the issuance and supervision of federal leases and the enforcement of all regulations applicable to the leasing of mineral resources.<sup>254</sup> The conceptual basis for this split responsibility comes from the intent of Congress that DOE provide the focus for energy planning and policy making, allowing Interior to continue its responsibility for managing and leasing federal resources.<sup>255</sup>

The DOE Organization Act also established a Leasing Liaison Committee to facilitate coordination between the two departments.<sup>256</sup> Composed of an equal number of representatives from each department, the Committee addresses policy issues and makes recommendations to the respective Secre-

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251. The Department of Energy's regional coal production forecasts changed markedly between June 1978, the date of the first forecasts, and April 1979, the date of the interim updates which now serve as the basis for the federal coal management program. In less than one year each of the ten major assumptions which serve as the basis for DOE's regional coal production scenarios have changed significantly. The ten principal assumptions for the computer program are: world oil prices; natural gas prices; coal labor costs; coal capital costs; transportation costs; nuclear capacity; environmental regulations for utilities and other industrial complexes; coal conversion requirements for utilities; macro-economic forecasts; and coal exports. INTERIM UPDATES, *supra* note 240, at 3.

252. 42 U.S.C. § 7101 (1979).

253. *Id.* § 7152.

254. *Id.* § 7153.

255. *See* S. REP. NO. 164, 95th Cong., 1st Sess. 1, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 854, 855.

256. 42 U.S.C. § 7140 (1979).

taries to implement what appear at times to be overlapping and conflicting responsibilities.<sup>257</sup> Unfortunately, this split of leasing responsibility between the departments is not working smoothly. Bureaucratic turf battles have developed, and coordination problems between the departments continually erupt.

The departments have attempted to clarify their respective roles with regard to the Federal Coal Management Program on the development and use of production goals. A memorandum of understanding (MOU) was executed covering the coal production goals but was worded in such vague and subjective terms that little more was delineated than the groundwork for additional conflicts.<sup>258</sup> Although not specifically required by the DOE Organization Act, Interior and Energy have agreed to establish coal production goals but have disagreed as to their essential purpose. Interior officials, on the one hand, view the production goals as an informational item only. Thus, the relationship between coal production goals and leasing is indirect. Interior's interpretation indicates that leasing does not occur to meet production goals; rather, the goals are but one factor among many the department will consider in developing a leasing program.<sup>259</sup>

In contrast, Energy officials view the coal production goals as the core of federal leasing policy and the first among equal factors for development of a leasing program and schedule. In the words of the Deputy Secretary of Energy at the March 1979 meeting of the Leasing Liaison Committee, "*the goals drive the schedule.*" In other words, DOE feels lease schedules should be constructed with the intent of attaining production goals.<sup>260</sup>

Even though Interior seems intent on using DOE's coal production goals as an integral part of the new coal program, Interior officials themselves have questioned the production goals methodology, validity and format.<sup>261</sup> Many of the problems associated with the coal production goals can be attributed to the short time constraints imposed on DOE for their development and from slow and insufficient feedback from Interior. Although the departments have held several meetings and informal information exchanges over the last two years, their respective roles and responsibilities are as yet not clearly defined.

To remedy the situation the departments have established a coal production goal and leasing target working group with the responsibility to:

- (1) Facilitate the exchange of information on coal between the departments;
- (2) Coordinate timing, scheduling and other technical aspects in the execution of the memorandum of understanding between the departments concerning production goals and leasing targets;

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257. See U.S. GENERAL ACCOUNTING OFFICE, FEDERAL LEASING POLICY—IS THE SPLIT RESPONSIBILITY WORKING?, REPORT NO. EMD-79-60 (1979) [hereinafter cited as GAO REPORT ON LEASING POLICY].

258. FEDERAL COAL EIS, *supra* note 22, at B-1 to B-3.

259. GAO REPORT ON LEASING POLICY, *supra* note 257, at 5.

260. *Id.*

261. *Id.* at 6.

- (3) Resolve questions relating to interpretation and application of coal models used in production goal and leasing target setting; and,
- (4) Generally provide a mechanism for interchange of technical ideas and views between the departments.<sup>262</sup>

The working group will serve in an advisory capacity to the Leasing Liaison Committee and will present non-binding recommendations to the departments. Essentially, the group is to facilitate communications between the departments to eliminate problem areas.

The results of the disagreement between the departments have generally been significant delays in development and implementation of regulations which are integral aspects of the federal leasing program. Significantly, while some Interior officials regard diligence requirements as having more impact on coal production than the coal production goals, DOE has yet to issue final regulations setting new diligence requirements.<sup>263</sup> Similarly, industry officials have expressed concern about the uncertainty arising from significant gaps in final regulations. It is thus imperative that the coordination problems between the departments be resolved and regulations issued as expeditiously as possible.

In addressing the significance of the problems between the two departments, the GAO has cited what is perhaps the most critical problem characterizing the coal program in general and the relationship between the Departments of Energy and Interior in particular. Specifically,

There is an inherent reluctance among (Interior and Energy) staff members to bring problems to the (Leasing Liaison) Committee. They are reluctant to place members of the Committee in positions which could lead to major disagreements. This is coupled with a fear that an inability to resolve problems reflects poorly on their capabilities and competence.<sup>264</sup>

### C. *Land-Use Planning and Tract Selection*

#### 1. *Unsuitability Criteria and Their Application*

The critical decision during the land use planning process under the preferred program is the identification of areas acceptable for further consid-

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262. SECRETARIAL ISSUE DOCUMENT, *supra* note 33, at 82.

263. GAO REPORT ON LEASING POLICY, *supra* note 257, at 11.

264. *Id.* at 13. This inherent reluctance by Interior staff to raise major problems with the development time schedules for the new federal coal program is a continuing source of frustration, particularly for the major coal producing states in the West. Almost from the moment western state governors were invited to participate with the Department in development of the new program, the states have expressed major concerns with the time schedule for program development. Nearly every meeting held between the Coal Committee of the Western Interstate Energy Board and representatives of the Department of Interior since April 1978 was initiated with a request by the states for Secretary Andrus to delay implementation of the program. As initially proposed, the first federal coal lease sale under the new program would be held in October 1980—clearly the timing of the first federal coal lease sale was focused on the 1980 presidential election. This particular fact became more evident as significant problems surfaced and as continual requests from the states for schedule delay were denied by Secretary Andrus. As the time draws near for the first coal lease sale in January 1981, many of these same problems continue to plague implementation of the new program.

eration for coal leasing.<sup>265</sup> The essential tool used in this process is application of the unsuitability criteria to excise those areas which are considered more valuable for other resources than coal development.<sup>266</sup> Application of the unsuitability criteria, however, has been forced principally as a requirement of the federal lands program under the Surface Mining Control and Reclamation Act.<sup>267</sup> SMCRA mandates that the Secretary of Interior review all federal lands for unsuitability, and it allows citizens to petition for and against designation of lands as unsuitable.<sup>268</sup> Therefore, the department must have procedures to apply unsuitability criteria both as part of a comprehensive federal lands review *and* as part of a petition process.

Although a federal coal lessee's right to produce from the lease could be affected by both the federal lands review and the petition process, one must note the federal lands review under *Section 522(b)* of SMCRA is *not* a program required for the *designation* of lands as unsuitable for mining by DOI. Formal *designation* of federal lands as unsuitable will occur only in response to a petition to designate by an interested person under *Section 522(c)* of SMCRA. The federal lands review, rather than resulting in designation, results in: (a) land-use planning determinations, or trade-offs between competing resource values and land uses; and (b) unsuitability assessments or land-use planning recommendations to condition any leasing or mining, or to withdraw the lands from leasing.<sup>269</sup>

SMCRA prevents the department from approving a mining plan for coal lands that have been *designated* as unsuitable. In the absence of a petition for such designation, however, Interior has stated a preference *not* to approve a mining plan for an existing lease until after it has reviewed the leased lands for possible unsuitability. Nevertheless, Interior lacks legal authority, in some instances, to designate lands as unsuitable or to prevent the mining of lands in existing leases.

As a result of the varied legal authority for the establishment of unsuitability criteria, the use of specific unsuitability criteria will vary in its application to existing leases, new leases or for areas that are subject to a petition for formal designation of unsuitability under *Section 522(c)* of SMCRA. For example, criteria stemming from *Section 522(a)* of SMCRA (the direct source of the concept of unsuitability criteria) cannot be applied to lands on which an operator is producing coal on August 4, 1977, or to operations for which "substantial financial and legal commitments" have been made by January 4, 1977.<sup>270</sup> As well, unsuitability standards which are derived from *Section 522(e)* of the SMCRA cannot divest "valid existing rights."<sup>271</sup>

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265. See notes 181-87 & accompanying text, *supra*.

266. *Id.* All twenty unsuitability criteria listed at 43 C.F.R. § 3461.1 (1979) have been "field tested" in at least three coal regions: Green River-Hams Fork; Unita-Southwestern Utah; and Powder River. Three new unsuitability criteria are about to be field tested and are under consideration by Interior for addition to § 3461.1: (1) air quality; (2) sole source aquifers; and (3) wetlands. Interview with DeWitt John, Colo. Dept. of Nat. Res. (March 17, 1980).

267. 30 U.S.C. § 1272(a)-(b) (Supp. II 1978).

268. *Id.* § 1272(c).

269. See *generally Existing Lease Memo*, *supra* note 207, at I-6.

270. *Id.* See also SMCRA, 30 U.S.C. § 1272(a)(6) (1979).

271. 30 U.S.C. § 1272(a)(6) (1979).



A determination by the department that lands are subject to unsuitability criteria does not mean, necessarily, that no mining may occur there. The Federal Lands Review is to assess whether the lands are "unsuitable for all *or certain types* of surface coal mining operations."<sup>272</sup> While the term "surface coal mining operations" does include "surface operations and surface impacts incident to an underground coal mine,"<sup>273</sup> clearly some unsuitability assessments will result in recommendations only against leasing for, or prohibitions against, mining of certain types. These considerations will be an integral part of the application of the unsuitability criteria (either in the land-use planning or in the mine plan approval phase) or in the designation of lands in response to a formal petition.<sup>274</sup>

The unsuitability review process under the Federal Lands Review is set out in great detail in Department of Interior instruction memoranda issued in 1978.<sup>275</sup> In summary, the assessment of unsuitable areas in the land-use plan is *not* the formal designation that may result from a petition under Section 522(c) of the SMCRA. As well, the assessment of unsuitable lands in the land-use planning process will have different consequences for unleased and leased lands. *For unleased lands*, the BLM land-use planners will then determine whether or not to exercise any applicable exception to a criterion. The department will not further consider for leasing those unleased areas with identified problems, on which it chooses not to assert an identified exception.<sup>276</sup>

A determination that *leased lands are unsuitable*, however, means that the department will necessarily apply *all* exceptions to the criteria in question. This may happen either in the course of land-use planning or in response to a submission of a mine plan on the lease. If any exception applies, Interior will allow mining subject to conditions or mitigating measures inherent in the exception. If no exception applies, though, Interior will proceed to the final "screen" and decide whether the lease is exempt from the application of the criterion in question because, for instance, the operator has made substantial financial or legal commitments to the lease. If the lease is exempt, the determination that the lands are unsuitable will not prevent mining. Where the leased lands are not exempt (not "grandfathered" from adverse application of the criteria as valid existing rights or as an operation to which substantial financial and legal commitments were made), the Department of Interior may continue to prohibit mining and the department may formally designate the lands as unsuitable in response to a petition for formal designation under Section 522(c) of SMCRA.<sup>277</sup>

Unsuitability criteria will also be applied to lands as part of the mine plan approval process where land-use planning has not been completed on a

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272. *Id.* § 1272(b).

273. *Id.* § 1291(28).

274. *See Existing Lease Memo*, *supra* note 207, at I-14.

275. U.S. DEPT OF INTERIOR, INSTRUCTION MEMORANDUM (November 8, 1978), *republished* at 43 Fed. Reg. 57,664 (1978); INSTRUCTION MEMORANDUM 79-139 (December 15, 1978), *republished* at 44 Fed. Reg. 2201 (1979).

276. *Existing Lease Memo*, *supra* note 207, at I-16.

277. *Id.*

leased tract at the time a mine plan is submitted for approval. If a criterion applies, Interior will evaluate whether, under an exception to the criterion, the mine plan could be changed to eliminate the harmful impacts on the value which the criterion is designed to protect. If no change could be made and some or all of the proposed mine operation could not occur consistent with the criterion, Interior will decide whether the mine operator is exempt from application of the specific criterion. If he is not, the department will condition or prohibit mine operations on some or all of the leased lands when the department acts on the mine plan.<sup>278</sup>

Application of the unsuitability criteria in land-use planning and in response to a proposed mine plan differs significantly from the formal designation process initiated by a petition to designate lands as unsuitable under Section 522(c) of the SMCRA. Formal petitions for unsuitability designation are filed with the Office of Surface Mining Reclamation and Enforcement (OSM) and must contain allegations of facts with supporting evidence to establish the truth of the allegations regarding unsuitability.<sup>279</sup> Designation of lands as unsuitable, rejection of the petition for such designation, or termination of a prior designation will occur within one year of the filing of the petition.<sup>280</sup> The formal petition process apparently is not limited to unleased federal coal lands. Rather, the process applies to leased lands as well, subject to the exemptions set out in SMCRA. These exemptions include:

- (1) The application of criteria derived from Section 522(e) is subject to valid existing rights;
- (2) The application of criteria derived from Section 522(a) does *not* apply to operations in existence on August 4, 1977, operations permitted under SMCRA, and operations to which substantial financial and legal commitments were made prior to January 4, 1977.<sup>281</sup>

Therefore, the unsuitability of leased lands may be assessed under the petition process without any mine plan pending, or without any land-use planning process occurring. As well, the lessee may petition to have any designation of the leased lands as unsuitable for coal mining terminated under the same petition process and time limits.<sup>282</sup>

Clearly the most perplexing aspect of the above discussion centers on the tremendous potential for uncertainty this situation poses for federal coal developers. Most importantly, one must recognize that while the criteria applied in the federal lands review and the petition process are the same, OSM controls the outcome of the formal petition process instead of the surface management agency (*e.g.*, BLM). It may be that certain lands which are not found to be unsuitable in land-use planning may be designated unsuitable upon petition and, as well, lands deemed unsuitable by the surface

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278. *Id.* Mine plan approval procedures for federal coal lands have been outlined among BLM, OSM and GS, as well as the affected states, in a Memorandum of Understanding (MOU) executed on October 24, 1979. FISCAL 1979 COAL REPORT, *supra* note 21, at 21; MOU, *republished* at 44 Fed. Reg. 7009 (1980).

279. 30 U.S.C. § 1272(c) (1979).

280. *Id.*

281. *Id.* § 1272(a)(6).

282. *Id.* § 1272(c).

management agency may not be designated unsuitable by OSM upon petition. This apparent inconsistency occurs because the unsuitability criteria and their exceptions are designed to insure environmental protection and mitigate adverse impacts. This contrasts with the formal designation process which requires consideration of coal demand and socio-economic impacts in carrying out the environmental purposes served by the criteria. Thus, the difference in origin and function between the unsuitability criteria themselves and the formal designation process will cause a great deal of uncertainty and consternation as mining companies assess particular land development possibilities.<sup>283</sup>

## 2. Coal Tract Selection

Following completion of the land-use plans and application of the unsuitability criteria to determine areas for further consideration, the delineation, ranking, selection and scheduling of tracts for lease sale commences. Preliminary tracts within acceptable areas are first designated based primarily on technical coal data, resource conservation considerations, and surface ownership patterns.<sup>284</sup> Before tracts are officially delineated, however, the BLM will publish a call for submissions by the industry of expressions of interest in leasing possible tracts.<sup>285</sup> The states will also be encouraged to suggest possible tracts, particularly tracts of importance for state-owned coal.<sup>286</sup>

Analysis of potential environmental impacts and geology related to each tract will follow preliminary tract identification. All three of these steps—submission of expressions of leasing interests, tract delineation, and site-specific analysis—are designed to follow the completion of specific land-use plans and to be undertaken in the land use plan areas. Ultimately, then, the Secretary of Interior will select specific tracts for lease sale and lease sales will be held.<sup>287</sup>

One of the principal differences between the new Federal Coal Management Program issued by Secretary Andrus and the EMARS program insti-

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283. In order to insure the greatest consistency between OSM's unsuitability designations and BLM's land-use planning unsuitability assessments, final BLM land-use planning regulations for the new federal coal program require the same detailed statement which will consider "the potential coal resources, the demand for coal resources, and the impact of such designation on the environment, the economy, and the supply of coal." 43 C.F.R. § 3461.3-3 (1979).

Seemingly every conceivable opportunity to remove federal coal lands from further consideration for leasing has been provided in the new federal coal regulations. For example, § 3461.5(b) provides, "After assessing *unleased lands* to be unsuitable in a comprehensive land use plan or land use analysis, *the surface management agency may petition* the Surface Mining Officer to designate the lands as unsuitable under 30 C.F.R. Part 769." (Emphasis added).

Further, § 3461.5(c) provides, "After assessing *leased lands* to be unsuitable under any criterion, its exceptions and exemptions, *the surface management agency shall petition* the Surface Mining Officer to designate the lands as unsuitable under 30 C.F.R. Part 769." (Emphasis added.)

Thus, federal surface management agencies have been formally designated by regulation members of the group "having an interest which is or may be adversely effected" who may petition for a formal designation of unsuitability. 30 U.S.C. § 1272(c) (1979).

284. 43 C.F.R. § 3420.4 (1979).

285. *Id.* § 3420.4-2.

286. *Id.*

287. *Id.* §§ 3420.7-3422.4.

tuted by former Secretary of Interior Kleppe is the reorientation of land-use planning and "calls" for industry expressions of interest.<sup>288</sup> As expected, the timing for an official call for these expressions of interest has been criticized by industry representatives and lauded by representatives of the environmental community.<sup>289</sup> However, the Mining Task Force Coal Leasing Group of the National Coal Policy Project has recently issued a strong recommendation to change this system. The latest discussion draft of the recommendations of the Task Force states categorically, "A formal procedure should be established for expression of industry interest in leasing early in the land-use planning process. These areas and ecologically related areas should receive high priority for application of unsuitability criteria."<sup>290</sup> The rationale used by the Task Force to support their recommendation is that early identification by the industry of potential leasing areas will focus the collection of more detailed inventory information in areas with mining potential, and thus significant financial and manpower resources will be used to the maximum benefit.<sup>291</sup>

The Task Force draft recommendations go further in suggesting that "thresholds" be defined for acceptable levels of environmental and socio-economic impacts at the land-use planning stage.<sup>292</sup> Thus, says the Task Force, threshold levels should be established at a minimum for wildlife and socio-economic impacts. The setting of thresholds in the land-use planning process will, the Task Force suggests, involve difficult weighing of the diverse interests of local residents, local and state government officials, environmentalists, industry and federal policy objectives. To be successful, then, "It is essential that the threshold setting process be open with ample opportunity for public participation. To this end, BLM should establish special procedures for public participation in setting thresholds as part of the public participation plan that is established for a (Resource Management Plan) planning unit."<sup>293</sup>

In concluding and summarizing their recommendations for revisions to the new coal program, the Task Force states:

All tracts that have been identified as potentially suitable for mining during the land use process should be made available for leasing through competitive bidding procedures. Elimination of regional leasing targets and identification of tracts of industry interest early in the land use planning process, combined with a rigorous application of the threshold approach, eliminates the need for tract delineation, ranking and selection in the activity planning stage, as the program is presently structured.<sup>294</sup>

Thus, the Task Force, which is represented principally by the environmental community and industry rather than state and local government, is recommending a major shift back to a key component of the old EMARS program

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288. See notes 174-77 and accompanying text, *supra*.

289. FEDERAL COAL EIS, *supra* note 22, at K23-26; K27-28; K-31-39.

290. DRAFT COAL PROJECT RECOMMENDATIONS, *supra* note 244, at 2.

291. *Id.* at 6.

292. *Id.*

293. *Id.* at 8.

294. *Id.* at 10.

and is suggesting the elimination of the entire Regional Coal Teams' activities for coal tract delineation, ranking and selection. The environmentalists admit their support for an early expression of industry interest in leasing represents a significant departure from the position they have taken in the past.<sup>295</sup> Nevertheless, several reasons are presented for their new position:

1. The Task Force cites one of the principal problems in the entire planning process as being the lack of generally available information for most areas that are potentially suitable for mining. As a result, the unsuitability criteria are allegedly not applied very effectively and early expressions of industry interest, "would focus efforts to gather the information necessary to effective land-use planning and application of the criteria;"<sup>296</sup>
2. The Task Force also suggests that although the industry is presently free to identify areas of interest before the activity planning stage and while still in the land-use planning stage, a formal request for industry's expression of interest defined "according to townships" will insure that the unsuitability criteria are applied to an area large enough (larger than the area of specific industry interest) to allow an evenhanded application of the criteria, "but still smaller than the total areas of medium and high coal development potential as identified by the USGS in a coal region."<sup>297</sup> Supposedly, then, data collection efforts can be more focused.

The rescheduling of the call for industry expressions of interest under the new program has been a sore point with industry representatives throughout development of the program.<sup>298</sup> Watching the first test of the new regional coal team concept and the activity planning process in the Green River-Hams Fork coal region, however, has provided some interesting revelations. For example, the purpose of the December 13, 1979, meeting of the GR-HF regional coal team in Denver was to begin the tract ranking and selection process for different levels of leasing targets and to evaluate different leasing targets in the regional EIS and ultimately to rank tracts on the three levels of leasing.<sup>299</sup> Following completion of the tract ranking process, the meeting was opened to hear public comments from members of the audience. On this particular subject, Mr. Brad Klafehn made the following interesting statement:

Also, my review of the expressions of interest show that all the Colorado tracts anyway were the subject of at least one expression of interest by an industry member and out of the eight or so largest tracts in Colorado, six had been the subject of competitive lease applications under the EMARS system. The other two had been listed by BLM in the northwest Colorado EIS as areas of BLM designated coal leasing areas. . . . *So it is obvious that the tracts that you all have considered up until now have been synonymous with the tracts*

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295. *Id.* at 11.

296. *Id.* at 12.

297. *Id.*

298. *See* note 289 *supra*.

299. Meeting Minutes, Green River-Hams Fork Coal Region—Regional Coal Team Meeting, at 1 (December 13, 1979).

*under EMARS and I think that this points out that the universe of the tracts that you all have to choose from to meet the leasing target that either industry has expressed interest in or BLM has expressed interest in is a response to industry's desires under EMARS. Now, I have to say that this is a far departure from what we had been led to believe would happen under this federal coal management program. . . . It seems as it stands now we just aren't given any choice in terms of the environmental impacts of these tracts. It turns out that most of them are pretty much equal. . . . It just seems to me that the desire isn't here, instead we are falling back into a EMARS routine. So I would formally request that additional coal lease tracts be delineated for consideration.*<sup>300</sup>

Clearly, even though the new coal program has technically reoriented the scheduling for expressions of industry interest, the informal opportunity provided in regulations for the industry to provide data and areas of interest, combined with the formal expressions of interest which take place at the activity planning level, appears to be accomplishing what the Coal Policy Project Task Force is suggesting. Specifically, the interests of the industry are in fact being considered, and available manpower and administrative resources are being focused on those areas where industry interest is greatest and where detailed information, as a result, may be most available. Arguably, the fact that the specific tracts under consideration by the Green River-Hams Fork Regional Coal Team are nearly identical to areas where industry has expressed interest may have occurred by default; *i.e.*, because of the paucity of information in other areas, the Team may have been forced to analyze particularly those areas where industry-generated data was most available. It is too early to attempt a case study review of the activities and thus establish a pass or fail grade for the first test of the new federal coal program. Until such a case study can be completed, however, the procedures outlined for industry input appear to be working well, at least in the case of the Green River-Hams Fork coal region.

#### D. *Regional Coal Teams*

The Task Force recommendation that the Regional Coal Teams be terminated completely should not be implemented. This recommendation stems principally from the earlier suggestions by the Task Force that leasing targets, as well as tract ranking and delineation, be eliminated from the new coal program.<sup>301</sup> Although a recommendation to terminate the Teams completely may logically stem from earlier Task Force statements that the Team's responsibilities be eliminated, the Teams as established serve an extremely worthwhile purpose and are operating with a minimum of difficulty to date.

Although the Teams have been established by regulations implementing the new coal program,<sup>302</sup> Secretary Andrus has recently established a more formal legal foundation for the Teams by way of a "charter" issued

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300. *Id.* at 8.

301. DRAFT COAL PROJECT RECOMMENDATIONS, *supra* note 244, at 25.

302. 43 C.F.R. § 3400.4 (Supp. II 1978).

pursuant to the Federal Advisory Committee Act.<sup>303</sup> A notice of establishment was executed by Secretary Andrus on December 21, 1979, certifying the creation of the federal-state Coal Advisory Board.<sup>304</sup> In essence, the Coal Advisory Board (Board) is comprised of all the eight Regional Coal Teams established under the program. The duties of the Board mimic exactly the responsibilities of the Regional Coal Teams including the responsibility to: (a) suggest policy for regional lease setting, tract delineation, and site-specific analysis; (b) guide and review tract ranking; (c) conduct the sale scheduling process; (d) recommend adjustments to regional production goals; and (e) serve as the forum for federal/state consultation and cooperation in all major department coal management program decisions.<sup>305</sup>

Although at first glance, the Teams appear to be little more than a staff coordinating mechanism to implement the new federal program, in actuality they are a rather unique experiment in federal/state cooperation. Until clear and convincing evidence is presented that this experiment is failing, this author wholeheartedly supports the Department of Interior's decision to make the Teams the central focus of all policy and implementation activities for the new program. For those who have participated on or worked with other federal advisory committees, the unique character of these particular federal coal advisory committees (the Teams) is clearly evident.

In essence, advisory committees established for the many federal agencies are made up of individuals principally from outside the federal government. These committees meet one or more times each year to provide input to individual federal agency programs and are designed to suggest policy changes to department heads. As such, these advisory committees are not comprised of members who have any direct say or responsibility for making policy decisions within a federal agency.

In contrast, the Regional Coal Teams, and thus the Federal Coal Advisory Board, are comprised of voting members representing the BLM, the state directors of the BLM, and representatives of the governors of each of the affected states. These particular individuals will ultimately retain direct responsibility for making major policy changes and implementing these changes within the federal establishment, and the state representatives have an additional responsibility to implement policy in the affected states. So, although the Teams are termed coal "advisory committees," they are advisory with a twist; i.e., the particular committee members are at once advisors and the principal persons responsible for implementing their own advice, subject always, of course, to the ultimate approval of the Secretary of Interior and individual governors. Moreover, establishment of the Teams and the authorization for the governors of affected states to nominate a voting member of the Team was the result of a realization that state government is not merely another member of the general "public."

If the new coal program is ultimately deemed a failure, the failing will not be a function of the individuals involved in implementing the new pro-

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303. 5 U.S.C. App. 1 (Supp. II 1978).

304. *Charter for Federal-State Coal Advisory Board*, republished at 44 Fed. Reg. 14,154 (1980).

305. *Id.* at § 7.

gram; rather, it will be a function of the inaccurate, insufficient, and generally convoluted data and information which is presently being generated.

Some of the major concerns expressed by state officials with respect to federal/state cooperation are summarized in the June 1979 GAO report, "Issues Facing the Future of Federal Coal Leasing."<sup>306</sup> These concerns include:

1. The interstate character of coal leasing and development including the impacts on air quality, water quality and availability, and population shifts and housing;
2. Adverse effects on cities and towns of increased coal train traffic including concern about the effects of this traffic on the availability of needed public services, such as police and fire protection and medical services;
3. The development of coal production goals and leasing targets and the possibility that Interior may emphasize low development in some states even though the states may encourage high development or vice versa; and,
4. The importance of intermingled federal, state, and private coal lands and an interest in working closely with Interior in establishing logical mining units before lease sale. Without such cooperation, the ability of the states to plan and control the social and economic consequences of coal development will be decreased.<sup>307</sup>

As Executive Director and General Counsel of the Western Interstate Energy Board throughout 1978 and 1979, the author admits to a degree of self-interest in the categorical support of the Regional Coal Teams. However, the degree of input now available to affected western states with regard to the new coal program is clearly unique in the history of federal land and resource development. This precedent for state/federal cooperation and the objectives of the state representatives is summarized in the March 23, 1979, issue of the Weekly Newsletter published by the Western Interstate Energy Board:

While the [federal coal management] rules are only draft at this time and additional changes may be forthcoming, the amount and quality of state participation in all federal coal leasing decisions is significant. Although no veto power is given to the states, the draft rules, if successfully implemented, make states through the governors a major participant in all federal coal decisions. Major participation in federal coal leasing decisions has consistently been a significant energy objective of western governors over the past five years. While some critical issues remain to be resolved in the regulations, the process used in developing the program and the proposed regulations may be exemplary of good state/federal cooperation. During the past ten months the major coal states in the West—North Dakota, Montana, Wyoming, Utah, Colorado, New Mexico, and South Dakota—through the (Energy Board's) coal committee have reviewed all the department's major working papers, met innumerable times with the persons in DOI who were

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306. U.S. GENERAL ACCOUNTING OFFICE, ISSUES FACING THE FUTURE OF FEDERAL COAL LEASING, REPORT NO. EMD-79-47 (1979).

307. *Id.* at 7, 26-27.



developing the program and participated in DOI working sessions on the draft environmental statement including the example regulations contained therein. Together with the strong backing of coal state governors, the committee was able to significantly influence the program's development.<sup>308</sup>

State government is not merely another member of the general "public." Rather, state government retains a distinctly different responsibility for and vested interest in the development of the major federal coal reserves in the West. As such, the federal and state governments must develop a "partnership" for the development and conservation of all federal resources and resource values including mineral development, wildlife preservation, and environmental protection. Without such a partnership, exemplified by the Regional Coal Teams, federal decisions regarding the development and preservation of such federal resources will be viewed with anxious suspicion and distrust by the states and will necessarily fall short of optimum results.

#### V. SUMMARY AND CONCLUSION—PROBLEMS THAT REFUSE TO GO AWAY

The general public in the United States is aware that the United States retains the greatest coal wealth in the world. The freedom to enjoy the luxuries attendant to our massive coal wealth, however, has been significantly constrained by a plethora of federal statutory restrictions on both public and private coal resources. These constraints have been imposed for the most part because coal is perhaps the most environmentally "dirty" energy resource available in the world today. Whether it is converted to a form capable of effective use through burning, gasification, or liquifaction, nothing changes its basic, environmentally damaging character.

Trade associations representing the coal industry continue to view government regulation as the principal deterrent to development of coal as this country's principal weapon in its struggle for energy independence. For example, Mr. Carl Bagge, President of the National Coal Association, addressed the Denver Coal Club's monthly meeting on February 14, 1980, and summarized five specific recommendations to open the door to coal development and utilization. Mr. Bagge stated:

1. The government must recognize its inherent inability to assemble the monumental amounts of data and information that would be required to carry out a (federal coal) program such as Interior has developed;
2. The government must abandon the central economic planning approach to the identification of quantities of coal for leasing;
3. The government must avoid unnecessary constraints on the mineability of coal reserves—particularly those which do not balance adequately the nation's various energy, economic, and environmental objectives;
4. The government must avoid unnecessary requirements that push up the cost of coal, or which are based on the ill-advised

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308. First Meeting of Precedent-Setting Regional Coal Teams Held, 26 *Western Energy Update* 10 (1979), *Western Interstate Energy Board Newsletter*, Denver, Colorado.

objective of maximizing government revenue at the expense of consumers; and,

5. The government must recognize its obligation to give rate and service protection to captive coal shippers and energy consumers.<sup>309</sup>

In essence, the five recommendations presented by Mr. Bagge can be summarized as follows: (1) "government, get off our backs and let us develop our resource," and (2) "government, please intervene to give us coal developers some relief from those dastardly railroads which are monopolizing coal transportation."

The irony is apparent in the recommendations listed by Mr. Bagge; however, I strongly agree with Mr. Bagge's first recommendation. In fact, the massive amount of statistical and resource data which is required by the new Federal Coal Management Program may never be developed to a point that will satisfy all interested parties. Whereas the major failing of the earlier EMARS II program was the inability of the Department of Interior to demonstrate the "need for leasing," the Achilles' heel of the new Federal Coal Management Program is fast becoming the inability to generate timely and defensible data to implement the many varied aspects of the system. Without accurate, comprehensive data the program will fail under the weight of its own primary assumption; i.e., that such statistics and information are available and are necessary to implement the program.

Whether the new Federal Coal Management Program will provide the stimulus needed for a renewed development of this country's most abundant fuel resource remains questionable. Legal challenges have already been filed on the new program.<sup>310</sup> However, if Interior continues to work as closely with the coal producing states as it has in promulgating the final program regulations, the state of federal coal development will improve dramatically from the depressed and depressing circumstances which characterized federal coal leasing in the 1970's.

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309. Address by Carl E. Bagge, President, National Coal Association, to the Denver Coal Club (Feb. 14, 1980).

310. The National Coal Association and American Mining Congress have challenged several FCMP rules in conjunction with their suit on the Surface Mining Control and Reclamation Act of 1977. *Texaco, Inc.*, has filed a similar suit in federal district court in Washington, D.C. *See* *NCA, AMC v. Andrus*, Civ. No. 79-2458 (D.D.C. 1979) and *Texaco v. Andrus*, Civ. No. 79-2448 (D.D.C. 1979).

**APPENDIX A****COAL SUMMARY DATA BY REGION\***

TABLE 1

Coal Summary DataPowder River Region

1976 total production: 37.4 million tons

1985 DOE projected production: 121.5 (low), 137.6 (medium), 157.3 (high)  
million tons

1990 DOE projected production: 291.9 (low), 417.7 (medium), 459.3 (high)  
million tons

Currently planned 1985 production: 219.1 million tons

Likely production from existing Federal leases not yet in mine plans: 7.0  
million tons

PRLA production potential: 48.5 million tons

Total planned and likely production plus PRLA production potential: 274.6  
million tons

Percent Federal coal ownership: 80 percent

Indian coal reserves: Major high quality reserves on Cheyenne and Crow  
reservations in Montana

Extent of checkerboard, other fragmented non-Federal coal ownership: At  
least two-thirds of non-Federal reserves require complementary Federal  
coal to be developed.

TABLE 2

Coal Summary DataGreen River-Hams Fork Region

1976 total production: 25.7 million tons

1985 DOE projected production: 69.2 (low), 102.5 (medium), 113.2 (high)  
million tons

Currently planned 1985 production: 49.8 million tons

Likely production from existing Federal leases not yet in mine plans: 6.8  
million tons

PRLA production potential: 0.3 million tons

Total planned and likely production plus PRLA production potential: 56.9  
million tons

Percent Federal coal ownership: 56.3 percent

Indian coal reserves: Minimal

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\* SOURCE: U.S. Department of Interior, 2 Secretarial Issue Document Federal Coal Management Program 14-35 (1979).

Extent of checkerboard, other fragmented non-Federal coal ownership: Extensive checkerboard area in Wyoming part of region, Colorado part has sizeable blocks of wholly non-Federal coal

TABLE 3

Coal Summary DataUinta-Southwestern Utah Region

1976 total production: 10.1 million tons

1985 DOE projected production: 14.4 (low), 14.5 (medium), 13.9 (high) million tons

1990 DOE projected production: 16.9 (low), 17.3 (medium), 20.6 (high) million tons

Currently planned 1985 production: 47.2 million tons

Likely production from existing Federal leases not yet in mine plans: 23.3 million tons

PRLA production potential: 13.2 million tons

Total planned and likely production plus PRLA production potential: 83.7 million tons

Percent Federal coal ownership: 82.9 percent

Indian coal reserves: Minor importance

Extent of checkerboard, other fragmented non-Federal coal ownership: No checkerboard, considerable fragmentation of other non-Federal holdings

TABLE 4

Coal Summary DataFort Union Region

1976 total production: 11.4 million tons

1985 DOE project production: 24.9 (low), 27.7 (medium), 32.2 (high) million tons

Currently planned 1985 production: 21.8 million tons

Total of likely production from existing Federal leases not yet in mine plans plus PRLA production potential: 19.7 million tons

Total planned and likely production plus PRLA production potential: 41.5 million tons

Percent Federal coal ownership: 39 percent

Indian coal reserves: Substantial

Extent of checkerboard, other fragmented non-Federal coal ownership:  
Considerable checkerboard, large non-Federal holdings that can be developed by themselves

TABLE 5  
Coal Summary Data  
San Juan River Region

1976 total production: 8.8 million tons  
1985 DOE projected production: 13.3 (low), 13.4 (medium), 13.8 (high) million tons  
1990 DOE projected production: 15.4 (low), 16.8 (medium), 22.5 (high) million tons  
Currently planned 1985 production: 24.0 million tons  
Likely production from existing Federal leases not yet in mine plans: 8.5 million tons  
PRLA production potential: 11.3 million tons  
Total planned and likely production plus PRLA production potential: 43.8 million tons  
Percent Federal coal ownership: 77.3 percent  
Indian coal reserves: Extensive on Navajo reservation  
Extent of checkerboard, other fragmented non-Federal coal ownership:  
Some checkerboard, some sizeable blocks of non-Federal coal

TABLE 6  
Coal Summary Data  
Denver-Raton Mesa Region

1976 total production: 1.9 million tons  
1985 DOE projected production: 6.1 (low), 5.1 (medium), 6.9 (high) million tons  
Currently planned 1985 production: 3.0 million tons  
Total likely production from existing Federal leases not yet in mine plans plus PRLA production potential: 20.6 million tons  
Total planned and likely production, plus PRLA production potential: 23.6 million tons  
Percent Federal coal ownership: 17.8 percent  
Indian coal reserves: not important  
Extent of checkerboard, other fragmented non-Federal coal ownership: No checkerboard, extensive large non-Federal holdings